1987

Secret Rights

Girardeau A. Spann
Georgetown University Law Center, spann@law.georgetown.edu

71 Minn. L. Rev. 669 (1986-1987)

Secret Rights*

Girardeau A. Spann**

Since the seventeenth century, when the concept of rights first came into vogue, philosophers and social theorists have struggled to articulate an acceptable theory of individual rights, but their efforts remain largely unsatisfactory. Without exception, each effort falters when it attempts to describe the contours of the rights that are entitled to protection or to explain the ways in which competing claims of right should interact. This is true whether a theorist seeks to define a right through reference to its substantive content or through reference to the procedures by which the right can be recognized. Given the collective stature of rights theorists, however, it is unlikely that their efforts have failed due to any lack of intelligence or creativity. Rather, the persistent failure of rights theory suggests that we have done just about all that can be done from within the analytical paradigm that has governed rational discourse to date.

The present paradigm is characterized by a brand of rationality that depends heavily upon language and logic. Whether the rights under discussion are legal or moral, positive or natural, language defines the rights and logic determines the consequences that flow from the linguistic definitions. The subtle distinctions and elusive comparisons demanded by a mature theory of rights, however, tax the capabilities of language and logic beyond their limits. Language is too inarticulate and logic too incomplete to serve as the chief components of a medium for rights analysis. Nevertheless, when analytical inadequacies do emerge, theorists try to overcome them with even more language and even greater logical rigor. But such efforts tend to

** Associate Professor of Law, Georgetown University Law Center. I would like to thank Norman Birnbaum, Frank Cassel, Peter Edelman, Barry Friedman, Deirdre Golash, Steve Goldberg, Colin Greer, David Kaye, Tom Krattenmaker, Mitt Regan, Mike Seidman, Allen Stairs, Mark Tushnet, and Nick White for their help in developing the ideas expressed in this Article. Research for this Article was supported by grants from the Project on the Federal Social Role and the Georgetown University Law Center.

be counterproductive because an inverse relationship is likely to exist between language and logic on the one hand and useful conceptualization on the other. The more we talk about rights, at least in the analytical language that we presently employ, the more likely we are to introduce distracting distortions and the less likely we are ever to capture the concept. Although a coherent concept of rights ultimately may prove to be available, like a secret, we may never be able to actually say what it is. As a result, it may be time to try a new paradigm.

The new paradigm that I have in mind reconceives analytical use of language and de-emphasizes analytical reliance on logic. Rather than attempting to approximate ineffable concepts through expository description, the new paradigm uses language in a literary sense to evoke such concepts directly. The contemplated paradigm de-emphasizes logic because the conceptual premises on which logical operations depend often elude the type of binary reduction required for logical evaluation. Consistent with modernist schools of thought that have begun to influence analytical as well as artistic disciplines, a reconceived set of analytical conventions may permit our notion of rationality to keep pace with our increasingly nonrational perceptions. Continued insistence on the present criteria of rationality, however, will serve only to impede our analytical growth.

Part I of this Essay begins by describing the essence of a theory of rights and demonstrates how the manipulation of language and logic can render the concept of rights too intractable to be coherent. Next, to deflect the suggestion that the problem is an artifact of the particular theory chosen for consideration, Part I performs similar manipulations on alternative theories of rights. The results suggest that the difficulty stems not from problems with the theories themselves but rather from problems inherent in the analytical conventions from which the theories emanate. Part II then examines the present use of language and logic in connection with rational analysis, demonstrating that both have limitations making them vulnerable to a variety of destabilizing analytical manipulations. Part II next presents a reconceived notion of language and logic that facilitates a modernist approach to rational analysis, with the enhanced conceptual freedom that modernism permits. Finally, Part III argues that continued suppression of the present limitations on our analytical abilities will only delay the shift to a new analytical paradigm that can provide qualitatively more

satisfying modes of conceptualization than are presently possible.

I. THE INTRACTABLE ESSENCE OF RIGHTS

A. ANTIMAJORITARIANISM

The essence of a theory of rights lies in its capacity to mediate the tension between the individual and society. If individuals existed in isolation, the concept of a right would be superfluous; each individual would have absolute autonomy. A society of two or more individuals, however, creates the potential for divergence between individual interests and the collective good. All theories of rights attempt to resolve the conflicts that arise from this divergence. Even a conflict between two individuals, which might initially appear to be wholly private, is essentially a conflict between the individual and society. A claim of right asserted by one of the individuals against the other has meaning only to the extent that society is prepared to intervene on behalf of the claimant, thereby transforming the nominally private dispute into a conflict between individual and collective interests.[1] Central to any theory of rights, therefore, is its prescription for dealing with the conflict that inevitably exists between the individual and society.

A theory of individual rights resolves the conflict between individual and collective interests by elevating certain individual interests to the status of rights and then placing them beyond the reach of societal abrogation, even when abrogation would serve the collective good.[2] In a democracy, the will of

1. If a private actor threatens to violate the rights of another private individual, any claim of right asserted by the latter exists not only against the private actor but also extends to the state—the society. Depending on the nature of the right involved, the claim against the state may consist of an entitlement to affirmative state protection or freedom from state interference with the individual's attempts at self-defense. Regardless of the form, some specification of the state's role appears necessary to any complete description of the scope of an individual right.

2. The proposition seems self-evident, but for a sophisticated derivation see Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 172-81 (1984). Virtually all moral and legal theories of individual rights provide some sort of immunization from societal abrogation. Natural rights theories presuppose a hard type of immunity under which a right is simply beyond the reach of juristic modification. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977) (judicial decisions must enforce existing rights); J. RAWLS, A THEORY OF JUSTICE 3-6, 54-65 (1971) (justice requires that society cannot override certain individual rights). Although positivist accounts of individual rights confer a softer, more context-dependent immunity, nobody can properly reject a claim of right made within a given legal framework as long as the society re-

the majority is said to determine the collective good. As a result, the essence of an individual right in a democratic society is its ability to override the majority's will to interfere with the exercise of that right.[3] Although the source and scope of an individual right can be problematic, once a right is recognized, no collective interest of society falling within the scope of that right properly can defeat it. By hypothesis, then, an individual right has the essential capacity to be antimajoritarian—to supersede the will of the majority.

As defined, the concept of an individual right becomes incoherent. Because the collective power of the majority supersedes the power of the individual, individual rights can exist only if the majority chooses not to exercise its superior power in a way that interferes with the individual right. If the majority chooses to honor rather than reject a claim of right, however, the claim is no longer antimajoritarian. Instead, it is simply an interest endorsed by the majority, and its classification as a right becomes superfluous. Majority endorsement precludes the interest from being an individual right by depriving it of the capacity to be antimajoritarian. Although the essence of an individual right consists of its ability to supersede the will of the majority, in fact, it can never do so. An individual right, therefore, lacks essential content.

To avoid the antimajoritarian dilemma, it is possible to assert that a right is something to which the majority always defers even though, in a particular circumstance, it would prefer not to do so. By definition, however, the majority prefers to do whatever it does. Indeed, the best measure of the majority's preference with respect to a particular issue is the way in which the majority permits the issue to be resolved.[4] A resolu-

---

tains the conviction that rejection would be improper. *See* H.L.A. HART, THE CONCEPT OF LAW 50-60 (1961) (rules are obeyed only if the underlying principle is accepted); *see also* J. RAZ, THE CONCEPT OF A LEGAL SYSTEM 175-83 (2d ed. 1980) (understanding the laws instituting rights is a precondition to defining rights). At the realist extreme of the positivist spectrum, where individual rights are simply defined in a post hoc manner to be those interests that society for whatever reason has chosen to protect, the concept of immunity begins to crumble. As the discussion in the text *infra* accompanying notes 3-10 demonstrates, however, the concept of rights itself begins to crumble as well.

3. The present analysis is in no way dependent upon the accuracy of this characterization. One could substitute the term "monarch," "dictator," or "power holder" for the term "majority" without affecting the point being advanced.

4. Other, nonpositivist measures of the will of the majority concerning an issue are possible, of course, but they are extremely problematic. Such measures entail difficulties in determining how the issue should be presented,

tion that corresponds to popular opinion obviously accords with the majority's preference. But even a resolution that appears to conflict with popular opinion in reality represents the preference of the majority. In such a case, the majority has simply authorized a procedure for issue resolution that is capable of producing results that conflict with popular opinion. Presumably, the majority authorized the procedure in the belief that it advances the majority's own long-term interests more than would deference to the immediate demands of public opinion. As long as the majority continues to favor the procedure that it has authorized, any outcome produced by that procedure necessarily corresponds to the preference of the majority.[5] Accordingly, the suggestion that a right corresponds to the majority's decision to override its own preferences does not avoid the antimajoritarian dilemma; the majority cannot override its own preferences unless its own preference is to do so.[6]

Arguably, one could avoid the antimajoritarian dilemma simply by denying a claim of right because the very act of majority denial would make the right antimajoritarian. This suggestion gives antimajoritarian content to the concept of rights, however, only by depriving the concept of any consequence. The idea that a claimed entitlement can become a right solely by dooming it to denial is inconsistent with the common conception that claims of right are capable of acceptance as well as

---

whose preferences should count, whether all preferences should count equally, whether the issue is understood in the same way by all those expressing a preference, whether the preferences as interpreted correspond to the preferences as expressed, and so on. These difficulties are minimized, although not completely avoided, by using a positivist measure of the majority's will.

5. Even if the prescribed procedure is not complied with in a given case, the issue will nevertheless have been resolved in accordance with the majority's preference. The majority will simply have preferred whatever resolution results to the expenditure of additional resources necessary for a higher degree of procedural regularity.

6. One might also argue that the concept of shifting majorities permits a right to be antimajoritarian and yet be honored by the majority. Because the position of the majority on any given issue can be determined by coalitions who join forces for different reasons, a majority made up of one coalition may reject the existence of a right in the abstract, whereas a majority made up of a different coalition may honor a particular assertion of that right in a particular context. Rather than establishing that the right has performed the logically impossible task of being antimajoritarian while being honored by the majority, however, the shifting majority phenomenon merely illustrates one of the difficulties involved in using a nonpositivist measure to determine the will of the majority. *See supra* note 4. Once a particular positive test is selected for ascertaining the will of the majority, the antimajoritarian dilemma reappears in full force.

wrongful denial. Moreover, unless a right has some nontrivial consequence, the concept of rights becomes a meaningless abstraction, hardly meriting the ink or blood that has been spilled over it.

Recognition may not be the only route by which a claim of right can have consequence. Because claims of right are essentially assertions of arguments in favor of adopting particular positions for a particular reason, they can have the moral force necessary to prompt action or to change attitudes, even though the majority ultimately rejects them. Indeed, revolutions have been fought precisely because claims of right were rejected. Accordingly, if the act of asserting a right has significant collateral consequence despite denial of the right itself, the coherence of the concept of rights might be salvaged. Denial would preserve the antimajoritarian content of the right, while the collateral consequence would prevent the right from becoming a meaningless abstraction.

Notwithstanding its superficial appeal, this proposed strategy for avoiding the antimajoritarian dilemma actually compounds rather than ameliorates the problem of incoherence. Based on the consequences that may flow from asserting a claim of right, the strategy impermissibly confuses rights with mere claims of rights.[7] A right is an actual interest. A claim of right, however, is simply a rhetorical device. It represents a particular type of argument, asserting that an interest is too important to be left in the hands of the potentially unreliable majority.[8] Although the concept of rights often may have rhetorical value in formulating such arguments, that does nothing to salvage the coherence of the underlying concept. More-

7. Rights and claims of right do not necessarily coincide. Many claims of right are invalid precisely because they do not rest on actual underlying rights. As a positive matter, the only way to distinguish between valid and invalid claims of right is to determine whether the majority honors a claim. If the majority finds the claim sufficiently compelling to honor it, the claim is valid. Once again, however, the act of recognition deprives the asserted interest of the capacity to be antimajoritarian.

8. A claim of right "works" by using antimajoritarianism as a measure of importance. The claim asserts that an interest is so important that not even the majority should be permitted to interfere with it for the collective good. As a rhetorical matter, to call something a right is to invoke a tradition of principled resistance to the exploitation of individual interests for the convenience of a transitory, often tyrannical majority that seeks to advance its own selfish interests or the interests of its leaders. Assuming that antimajoritarianism properly can be used as a rhetorical measure of importance, a claim of right is not really as much an argument in favor of importance as it is a conclusory assertion of importance.

over, a claim of right has one characteristic that causes it to compound the problem of incoherence. A claim of right does not simply represent an argument; it necessarily represents a bad argument. By asserting that an interest should be placed beyond the reach of majority abrogation, a claim of right argues in favor of a meaningless objective. Because individuals can never get more than the majority is willing to give, a form of argument premised on the belief that they can rests on an illusory assumption. The concept of rights is troubling enough, but a claim of right resting on that concept advocates what can never be more than a vacuous victory.

Rather than resolving the antimajoritarian dilemma, the claim of right strategy merely raises interesting questions about the nature of arguments that we sometimes find persuasive.[9] In the final analysis, there is no way to avoid the antimajoritarian dilemma because there is no way in which a right can have any meaning other than the meaning that the society chooses to give it. Further, because a right cannot exist independently of its societal endorsement, there is no way to establish its antimajoritarian essence. As a result, the concept of an individual right is problematic. It lacks either consequence or antimajoritarian content. For that reason, it also lacks logical coherence.[10]

If the foregoing analysis seems artificial, that of course is the point. The analysis generated a counterintuitive conclusion even though nothing was wrong with the analysis itself. Using linguistic terms in a way that is consistent with customary us-

9. In this regard, the concept of rights is similar to the concept of equality as illuminated by Professor Westen. Both are empty vessels, frequently filled with external meaning that is generally mistaken for the meaning of the vessel itself. *See* Westen, *The Empty Idea of Equality,* 95 HARV. L. REV. 537 (1982) (Equality has no substantive content of its own and derives substance entirely from claims of rights.). The Westen thesis generated spirited response. *See* Chemerinsky, *In Defense of Equality: A Reply to Professor Westen,* 81 MICH. L. REV. 575, 576 (1983) (The equality concept is necessary morally, analytically, and rhetorically.); D'Amato, *Is Equality A Totally Empty Idea?,* 81 MICH. L. REV. 600, 603 (1983) (Equality has a substantive content of its own.); Greenawalt, *How Empty is the Idea of Equality?,* 83 COLUM. L. REV. 1167, 1169 (1983) (identifying both formal and substantive principles of equality). For Professor Westen's reply, see Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply,* 81 MICH. L. REV. 604, 663 (1983).

10. Other strategies that have been used to raise questions about the concept of rights tend to emphasize the necessary indeterminacy of the concept rather than its incoherence. *See, e.g.,* Tushnet, *An Essay on Rights,* 62 TEX. L. REV. 1363, 1371-80 (1984). For a variety of left-leaning critiques of the concept of rights by critical legal scholars, see *Symposium: A Critique of Rights,* 62 TEX. L. REV. 1363 (1984).

age, the analysis formulated a series of analytical premises which, consistent with customary rigor, generated a particular logical conclusion. The conclusion, nevertheless, seems unacceptable. Adherence to a rational analytical paradigm as presently conceived, however, inevitably leads to the conclusion that the concept of individual rights is fatally flawed. Conversely, adherence to the concept of individual rights requires one to step outside of the rational paradigm and to rely on nonrational, intuitive modes of argument. Adherence to both is precluded because the nature of the analytical paradigm that presently governs our rational discourse precludes nonrational factors like intuitions from dictating the acceptability of conclusions. Indeed, the very appeal of rational analysis is that it frees us from the biases and predispositions inherent in our nonrational intuitions.

One might argue that the foregoing analysis contains flaws—a concept not fully articulated or a term whose definition went a little awry. Language rarely operates with such precision that it can eliminate all slippage between terminology and the concepts that the terminology represents. For every asserted flaw, however, an additional manipulation could be fashioned sufficient, both to eliminate the problem and to force another choice between counterintuitive rationality on the one hand and nonrational intuitions on the other.[11] Obviously, it is difficult to prove such a proposition in a unilateral presentation, so I will try to do the next best thing. I will offer additional examples of analytical dilemmas, in the context of alternative formulations of rights theory, in the hope of inviting extrapolation to the conclusion that there are problems with the present paradigm.

11. For example, a colleague suggested that the foregoing problem could be avoided simply by defining rights to correspond to the second-order preferences of the majority rather than insisting that rights be antimajoritarian. The present objective, however, is not to argue that any particular rights formulation is better than any other. Nor is it to deny that particular analytical manipulations can be sidestepped by reformulating initial premises. Rather, the point is that analytical manipulations can always be performed once the initial premises have been specified and locked in. If, for example, a second-order-preference formulation were settled upon as the definition of a right, the ensuing manipulations might first point out that the definition precluded the existence of any form of natural rights and might then go on to question whether there was really a meaningful difference between first- and second-order preferences and, if so, whether one set of preferences was really more deserving of deference than the other. Wherever you start the analysis, you can always generate a dilemma that will force you back to your intuitions.

B. Alternative Formulations of Rights Theory

Various formulations of rights theory are possible. One of the most common formulations is a liberal theory that relies on fundamental principles to protect individuals from political oppression at the hands of the majority. The fundamental principles on which liberal theory rests are often deemed to guarantee to the individual certain positive entitlements and to require affirmative governmental intervention to ensure that access to those entitlements is not denied through either private or official conduct. A second common formulation is a politically more conservative theory that secures to the individual a sphere of individual autonomy into which the government cannot properly intrude. This formulation is often referred to as a negative rights theory because, rather than focusing on positive entitlements that the government must provide, it emphasizes actions that the government should refrain from taking. A third variant on rights theory posits a communitarian or collective nature of rights. Although this variant could be characterized as the antithesis of an individual rights theory, it may simply amount to an alternative strategy for securing the same ultimate objectives pursued by a theory of individual rights. Each formulation of rights theory, however, embodies an analytical dilemma.

1. Liberal Theory

A liberal theory of rights, perhaps the most common contemporary formulation of rights theory, recognizes defined areas of individual liberty as predominating over competing collective interests.[12] To secure the desired degree of an-

12. Liberal theory is liberal in both the philosophical and political senses of the term. A liberal theory of rights is philosophically liberal because it adopts the goal of protecting individual liberty as the ultimate justification for state authority, thereby giving the individual primacy over the state as the fundamental social unit. Simultaneously embracing the Hobbesian belief that state intervention is necessary to prevent individuals from exploiting each other, *see* T. HOBBES, LEVIATHAN (A. Lindsay ed. 1950), and the Lockean belief that the scope of state power must be confined by the people so as to prevent state denials of individual liberty, *see* J. LOCKE, TWO TREATISES OF GOVERNMENT (T. Cook ed. 1947), liberal theory contains an inherent tension with respect to the question of who is ultimately supposed to restrain whom. Consistently, however, philosophical liberalism does accord primacy to the individual over the state.

A liberal theory of rights that accords positive entitlements is also politically liberal, as evidenced by its receptivity to resource redistribution and its endorsement of the high levels of government activity needed to administer an

timajoritarianism, liberal theory tends to define the scope of individual rights through reference to fundamental principles, which may or may not be contained in a written document. Because these fundamental principles have more legal force than the ordinary political preferences of the majority,[13] the majority cannot legally abrogate individual rights. The distinction between fundamental principles and political expediency is essential to the coherence of a liberal theory of rights, but efforts to establish the distinction simply produce another analytical dilemma.

Proper enforcement of individual rights depends upon proper interpretation of the governing principles. In addition, to ensure that the majority cannot abrogate an individual right, the process of interpretation must be free from domination by political considerations—considerations relating to the preferences of the majority. As it turns out, however, no nonpolitical way of ascertaining the meaning of a principle exists. Any procedure used to determine the meaning of a particular principle in a particular factual context is political. The principle/politics dilemma, therefore, precludes an individual right from being defined without recourse to majoritarian political considerations.

To demonstrate, consider first that a principle can have no

---

entitlement program. *See, e.g.*, R. DWORKIN, *supra* note 2, at 90-94; J. RAWLS, *supra* note 2, at 7-16, 60-64, 100-08; P. Edelman, A Judicially Declared Right To A Minimum "Survival" Income—An Idea Whose Time May Yet Come 74-84 (unpublished manuscript on file with the *Minnesota Law Review*); Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13-16 (1969) (discussing a proposition of "minimum protection against economic hardship"). Philosophical liberalism does not itself specify any given level of government intervention. The concept of liberty could be defined in a laissez-faire manner that implied minimal government activity, as it was in the seventeenth century era of Hobbes and Locke. Once the concept of liberty is defined to include positive entitlements, however, higher levels of government activity become necessary.

The recognition of any significant number of entitlements, whether in the form of food stamps or *Miranda* warnings, requires the establishment of an administrative state to define, implement, and monitor enforcement of the entitlement programs. In addition, an entitlement program functions by authorizing the government to take resources from some individuals who have them to give resources to other individuals who do not. Because of its tolerance for such government intrusiveness, the theory of individual rights on which our present welfare state rests is liberal in the political as well as the philosophical sense.

13. For example, constitutional provisions reflecting fundamental principles supersede statutory or common law doctrines reflecting majoritarian political preferences.

consequential meaning independent of its interpretation. To distinguish between a principle and its interpretation, we would have to know that a particular interpretation was erroneous. To deem an interpretation erroneous, however, requires reliance on yet another interpretation. As a result, we would have succeeded only in selecting among alternative interpretations, as opposed to distinguishing between a mere interpretation of principle and its actual content. Even if we were to vest one decision maker—say the Supreme Court—with interpretive authority superior to that of all others, we would have succeeded only in allocating power; we would have done nothing to distinguish between principles and their interpretations.

If no operative distinction between a principle and its interpretation exists, the question of what constitutes a proper interpretation of principle amounts to a procedural question concerning which of the competing mechanisms for interpretation is likely to yield the best result. We tend to reject majority-controlled mechanisms for interpretation because of the danger that the majority will abrogate the individual right at stake. Instead, we tend to rely on judges, whom we take great pains to insulate from majoritarian political influences. Such a mode of decision making, however, hardly merits characterization as principled rather than political. If the majority influences the judicial interpretation despite our prophylactic efforts, the judicial decision is merely a political decision masquerading as a principled one. Indeed, evidence suggests that many judicial decisions fall into this category.[14]

14. The standard of judicial review in constitutional cases is often deferential to majoritarian legislation. For example, the scope of review in substantive due process, economic regulation cases—cases that can be said to involve fundamental rights relating to property and contract autonomy—is now virtually nonexistent. In West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum-wage and maximum-hours legislation after substantive due process challenge), the Supreme Court abandoned its efforts, commonly associated with Lochner v. New York, 198 U.S. 45 (1905) (invalidating state maximum-hours legislation on substantive due process grounds), to scrutinize the merits of such majoritarian legislation. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-1 to 8-7, at 427-55 (1978). The customary standard of review in equal protection cases demands only that majoritarian legislation have a rational basis. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) (upholding public school financing scheme based upon property taxes after equal protection challenge). Even in cases involving fundamental rights or suspect classifications, where the nominal standard of review is more demanding, *see* L. TRIBE, *supra*, § 16-6, at 1000-02, the will of the majority may nevertheless control. *See, e.g.*, Naim v. Naim, 350 U.S. 985 (1956) (per curiam) (dismissing on jurisdictional grounds equal protection challenge to state antimiscegenation statute despite apparent presence of jurisdiction),

Moreover, even if a judge manages to avoid majority-influenced interpretations of principle, matters are likely to be worse rather than better. If majority preferences do not control the judicial decision, the judge's own preferences, as colored by any interest groups with whom the judge sympathizes, must control. Even a judge who consciously tries to ignore personal preferences ultimately does nothing more than sacrifice one personal preference to another less immediate preference. In such cases, the decisions are "political" in that they are based on potentially biased considerations of expediency rather than actual neutral principles, and not even the safeguards of majority endorsement are present. The only available options for decision, therefore, appear to be the political preferences of the majority or the political preferences of the judge, neither of which depend on any principle that exists free of political interpretation.[15]

---

dismissing appeal from, 197 Va. 734, 735, 90 S.E.2d 849, 850 (1956) (finding jurisdiction to hear and an adequate record), *in response to order of*, 350 U.S. 891 (1955) (per curiam) (vacating judgment and remanding case); Korematsu v. United States, 323 U.S. 214 (1944) (upholding Japanese internment during World War II after equal protection challenge); *see also* L. TRIBE, *supra*, § 3-8, at 55 (unarticulated institutional considerations may figure heavily in the Court's refusal to accept jurisdiction in a particular case); *id.* § 16-6, at 1000, § 16-14, at 1013-14 (discussing *Korematsu*). In addition, justiciability doctrines, including those relating to standing, ripeness, mootness, political questions, collusive suits and advisory opinions, often result in deference to majoritarian legislation by precluding judicial scrutiny of that legislation. *See generally* L. TRIBE, *supra*, §§ 3-7 to 3-29, at 52-114.

Furthermore, a legislative enactment challenged on constitutional grounds is statistically more likely to be upheld than it is to be struck down. Even during the *Lochner* era, when the Supreme Court was more willing than usual to invalidate legislation because of its disagreement with the merits of the legislation, the Court upheld more legislation than it invalidated. *See* L. TRIBE, *supra*, § 8-2, at 435 n.2 and authorities cited therein. For statistics showing the low number of statutes, especially federal statutes, that were invalidated on constitutional grounds during various periods throughout our history, see B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW *passim* (1942). Such statistics are, of course, vulnerable to categorization difficulties when statutes are only partially invalidated and they may be viewed as over-inclusive to the extent that they encompass constitutional issues not viewed as implicating individual rights.

15. In an effort to rehabilitate the distinction between politics and principle, one might argue that although the distinction may be theoretically elusive, qualitatively distinct ways of making decisions exist as a practical matter. Even if all decision making is political in some definitional sense, there is nevertheless an important difference between the everyday political expediency used by Congress in deciding whether to grant a special interest tax exemption, and the more austere type of decision making engaged in by the Supreme Court when it makes individual rights determinations. Proponents of this argument, however, would still have to establish that one mode of decision mak-

2. Negative Rights Theory

Negative rights theories seek to promote individual liberty by defining a private sphere of autonomy and self-determination surrounding each individual into which neither the government nor another individual can permissibly intrude.[16] Not

---

ing was better than the other at protecting individual liberty. There is in fact no sound basis for making such an assertion.

Because it is meaningless to suggest that one type of interpretation is more likely than the other to capture the actual content of the principle at issue, the argument must be that one type of interpretation is inherently more protective of individual liberty than the other. It is, however, difficult to see how such a claim could be demonstrated. Indeed, if there is any important difference between the two modes of decision making, it might be that congressional decision making is more protective of individual liberty than is Supreme Court decision making. Because Congress represents a variety of interests, the logrolling and other types of political compromise that occur during the legislative process might produce at least some deference to a wide range of individual interests. In the more homogeneous Supreme Court, where the justices represent only a narrow range of individual interests, the decision-making process would appear less likely to result in the protection of interests not represented by the justices themselves.

There is certainly no reason to believe that the Court, as an institutional matter, is better than Congress at protecting a wide range of individual interests. Indeed, as an empirical matter, the opposite might be true. Although the Court sometimes protects the individual interests of poor people, women, blacks, and other discrete and insular minorities, *see* J. ELY, DEMOCRACY AND DISTRUST 145-70 (1980), it does not always do so, *see, e.g.,* cases discussed *supra* note 14, and Congress has probably done much more to protect them than has the Court. For example, the civil rights legislation enacted since 1964 likely has done more to advance the interests of minorities than have the Court's constitutional decisions. Indeed, the Court sometimes defines the scope of constitutional protection simply to be coterminous with the scope of statutory protections. *See, e.g.,* General Elec. Co. v. Gilbert, 429 U.S. 125, 132-40, 145 (1976) (suggesting that Title VII and the equal protection clause afford the same protection against discrimination). Moreover, the Court has conspicuously declined to protect other individual interests, such as those of homosexuals. *See* Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (rejecting constitutional challenge to application of criminal sodomy statute to consenting homosexuals); Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976) (upholding sodomy statutes challenged by homosexuals). Furthermore, in City of Cleburne, Texas v. Cleburne Living Center, 105 S. Ct. 3249, 3255-58 (1985), the Court declined to accord heightened scrutiny to legislation affecting the mentally retarded because it trusted the majority to deal fairly with the problems of the mentally retarded through legislation. *See also* Nowak, *Resurrecting Realist Jurisprudence: The Political Bias of Burger Court Justices,* 17 SUFFOLK U.L. REV. 549, 618-19 (1983) (arguing that the rights of racial and political minorities are better protected through the political process than through reliance on the Supreme Court). Accordingly, even if different types of political decision making exist, no one type is demonstrably better than another at protecting individual liberty.

16. The extreme formulation of negative rights theory is libertarianism. *See, e.g.,* R. NOZICK, ANARCHY, STATE AND UTOPIA 33-35 (1974) (discussing lib-

only must the government itself refrain from intruding into these spheres of autonomy, but consistent with Hobbesian beliefs, if the government is to serve any meaningful function, it must prevent one individual from intruding into another's sphere of autonomy.[17] Indeed, the only reason that the government exists is to safeguard private spheres of individual autonomy.[18]

Like other theories of individual rights, a negative rights theory ultimately succeeds only in producing an analytical dilemma that is inescapable without transcending our present analytical paradigm. The viability of a theory of negative rights depends on the ability to distinguish between occasions for permissible and impermissible government intervention into private affairs. But such a prescription for government conduct cannot be written that does not itself violate the government's obligation to respect spheres of individual autonomy. Whenever the government protects one individual's autonomy from intrusion by another, it interferes with the autonomy of the second individual. If the government takes no action, however, it is refusing to protect the autonomy of the first individual and neglecting the only reason for its existence.[19] As a result, the government is stymied.

To avoid this dilemma, one could argue that some governmental failures to respect individual autonomy are permissible while others are not. Such an argument, however, sacrifices the very sphere of autonomy that negative rights theory purports to protect. Any criterion offered to distinguish permissible from impermissible intervention, if not wholly arbitrary, would have to rely on some principle. At best, interpretation of the principle would be the product of a majoritarian political

---

ertarian constraints against aggression). Negative rights theories are philosophically liberal but politically conservative. They are philosophically liberal because of their emphasis on individual liberty. The individual rather than the society remains the primary social unit and the government exists simply to benefit the individual. Negative rights theories are politically conservative, however, because of their distaste for redistributive positive entitlements and their preference for low levels of government activity. Indeed, these theories claim that the only acceptable justification for any government action at all is its necessity for the protection of individual autonomy; government action aimed at redistributive objectives is improper. *Id.* at 10-25, 149-50.

17. *Id.* at 10-25.

18. *Id.* at 10-12.

19. *Cf. id.* at 27-28 (noting this inconsistency in the context of the ultraminimal state); Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law,* 96 YALE L.J. —— (1987).

preference.[20] Consequently, the majority would ultimately define the principle that determined the sphere of protected individual interests. The objective of negative rights theory is to isolate a sphere of autonomy that the majority cannot penetrate. Hope of realizing that objective disintegrates, however, whenever the power to define the boundaries of the sphere rests with the majority.

Furthermore, it is difficult to imagine what type of criterion could ever distinguish between permissible and impermissible government intervention. The most obvious candidate is one under which an individual who tries to interfere with the autonomy of another individual relinquishes a personal right to freedom from government intervention, thereby permitting the government to protect the autonomy of the victim by interfering with the actions of the offender. That distinction, however, is untenable. Individuals always interfere with the autonomy of each other; that is what living in a society is all about. Applying the suggested criterion to something as common as a speed limit would be problematic. Would government enforcement be justified because speeders have interfered with the autonomy of other highway users, or would the law be invalid because the speed limit lobby had impermissibly interfered with the autonomy of speeders? Enforcement of heroin laws, Sunday closing laws and virtually any other law of consequence would pose a similar dilemma. Ultimately, deciding which party had been the victim and which the offender would depend on mere political preference. Thus, a criterion based on interference with another's autonomy is not useful for delineating permissible instances of government intrusion.

Any effort to rehabilitate a theory of negative rights is doomed to failure because no analytically acceptable distinction between public and private spheres of interest exists. The zero-sum, reciprocal relationship that exists between individual spheres of private autonomy means that whenever the government, in the exercise of its public function, protects or fails to protect a private interest, it is also interfering with a private interest in violation of the central tenet of negative rights theory. More fundamentally, however, the very concept of a private

20. *See supra* text accompanying note 14. At worst, interpretation of the principle would reflect only the preference of the individual interpreter, thereby undermining the concept of individual liberty by permitting one individual to define the scope of another's autonomy. *See supra* text accompanying note 15.

sphere of individual autonomy poses an analytical dilemma because the private sphere simply has no meaning independent of that given it by the public sphere. Accordingly, it makes no more sense to view a private sphere of autonomy as private than it does to view a principle as nonpolitical or an individual right as antimajoritarian.

3. Communitarian Rights Theory

Theories of communitarian or collective rights are not theories of individual rights at all. In fact, they are the opposite of theories of individual rights. Unlike liberal theories of rights, which treat protection of individual liberty as the ultimate objective,[21] communitarian theories subordinate individual liberty to collective well-being. Even though the pursuit of collective interests arguably can advance individual interests, the interest of the individual never prevails over the interest of the group. The group replaces the individual as the fundamental social unit.[22]

Abandoning the focus on individual liberty, communitarian theories initially may appear to have the capacity to overcome the analytical dilemmas plaguing liberal rights theories. After all, the antimajoritarian dilemma results because society could never recognize an individual right against the will of the majority.[23] Further, the principle/politics dilemma frustrates even a good faith effort by the majority to force itself to respect an individual right, because any constraint that the majority chooses to impose on itself depends upon acts interpretation, which in turn depends on the will of the majority or of the in-

21. *See supra* notes 12-13 and accompanying text.

22. Marxism is perhaps the most common communitarian theory of this type. Although contemporary versions of neo-Marxism can vary considerably, the desire to break down, or at least to de-emphasize, the allure of traditional liberalism remains a common thread. For an example of challenges to liberal premises, see Klare, *Critical Theory and Labor Relations,* in THE POLITICS OF LAW 65-88 (D. Kairys ed. 1982). For examples developed specifically in the context of communitarian rights, see Tushnet, *supra* note 10, at 1375-84 and M. Tushnet, Rights and Group Rights in Pluralist Society 15-23 (unpublished manuscript on file with the *Minnesota Law Review*). Communitarian rights theory, as used in the present context, should not be confused with theories of group rights sometimes advanced in connection with discrete and insular minorities. *See, e.g.,* Fiss, *Groups and the Equal Protection Clause,* 5 J. PHIL. & PUB. AFF. 107, 147-77 (1976) (arguing that race discrimination, and consequently the legal remedies for race discrimination, should be viewed as group phenomena).

23. *See supra* text accompanying notes 4-10.

dividual decision maker.[24] And even if the majority were to overcome this obstacle, the public/private dilemma indicates that the very act of protecting one individual right would necessarily implicate the majority in the denial of some other individual right.[25] Arguably, then, it makes little sense to claim that we are talking about individual rights at all when we talk about the protection of individual interests. We may be talking about nothing more than the preferences of society, and any effect on individual interests may be largely incidental. If so, this would seem to justify a shift in emphasis from individual to communitarian theories of rights.

Rights, however, are actually no more communitarian than they are individual in nature. Although the ultimate objective of a communitarian rights theory might be different from that of an individual rights theory, the problems encountered in seeking to implement that objective would be very much the same. Some determination must be made concerning what resolution of a given issue best advances the collective good. Whether that determination was made anew in each individual case[26] or was made in accordance with general principles thought to advance the collective good in the range of cases,[27] implementation of a communitarian rights strategy would depend on acts of interpretation performed by individual decision makers. As a result, some version of each dilemma that arose in the context of individual rights would reappear in the context of communitarian rights.

The public/private dilemma would reappear because of the continuing need to distinguish and strike the proper balance between individual and collective interests. Although the stated objective of communitarian rights theory is to advance the collective good, theorists would have to conclude that some concessions to individual autonomy were necessary to best promote the collective good, just as individual rights theorists believe that some concessions to the collective good will best promote individual liberty.[28] A means of defining the sphere of superior

24. *See supra* text accompanying notes 14-15.

25. *See supra* text accompanying notes 16-19.

26. Compare the concepts of act and rule utilitarianism, which are discussed in W. FRANKENA, ETHICS 34-43 (1973).

27. *See id. See generally* N. RESCHER, DISTRIBUTIVE JUSTICE 139-40 (1966) (bibliography of act and rule utilitarian sources).

28. One might argue that exclusive adherence to communitarian objectives, without regard to individual interests, would avoid the troublesome balancing inherent in the efforts of liberal theory to accommodate competing

collective interests that is free from domination by individual interests, however, is nonexistent. Just as the sphere of individual autonomy encompassing an individual right is suspect because it cannot exist in any way that the majority itself does not define, the sphere of collective interests comprising a communitarian right cannot be defined in any way that an individual decision maker does not ultimately determine. Accordingly, unless there is some way to ensure that individual interests do not impermissibly influence the scope of the public sphere, the public/private dilemma will persist even under a theory of communitarian rights.

The most promising way to ensure that communitarian rights are not subservient to the individual interests of the decision maker is to insist that the decision maker behave in accordance with the fundamental principles incident to a theory of communitarian rights. By rooting the interpretation of asserted rights in principle, rather than permitting it to flow from the preferences of the decision maker or an interest group with whom the decision maker is in sympathy, definition of the public sphere might be kept truly public. That, however, would serve only to reintroduce the principle/politics dilemma. Because it is meaningless to speak in terms of the actual content of a principle as opposed to its interpretation,[29] some method would have to be found for selecting among competing interpretations of the principle at issue. As was true with respect to individual rights, all available options are political rather than principled in nature. Even an interpretation that could be said to flow from the political preferences of the majority would not merit characterization as a principled interpretation. It would simply confuse principles with plebiscites.[30] Accordingly, there would be no nonpolitical way of determining the scope of a communitarian right, just as there is no nonpolitical way of determining the scope of an individual right.

---

individual and collective interests. That cannot be the case, however. Communitarian theorists have to balance precisely the same competing interests whenever they decide how much food, medical care, privacy, or freedom of expression they wish to make available to individuals in order to maximize the value of those individuals to the community. The fact that the ultimate objective of the balancing process is different does not eliminate the need to strike the balance.

29. *See supra* text accompanying notes 14-15.

30. Note that the meaning of a right in principle can differ from the views of a majority concerning the meaning of that right, even if the right is communitarian in nature. The majority may simply be wrong about what best advances the collective good.

Most significantly, a variant of the antimajoritarian dilemma would also reappear under a theory of communitarian rights. Just as no individual right can secure recognition unless the majority is willing to honor it, no communitarian right could secure recognition unless an individual were willing to honor it. Because a community can act only through individual agents, the fate of a communitarian right would depend completely on the decision of the agent delegated the power to control its recognition. Also, even though a particular agent could be removed for wrongfully failing to honor an asserted communitarian right, both the removal decision and any subsequent decision concerning recognition of the asserted right would have to be made by individual agents. Individuals, even those acting as agents of a community, can only be expected to act in ways that advance their own individual interests. Even individuals who claim to be acting in the interest of others are essentially maximizing self-interest within the structure of whatever incentive system exists. Although incentives can influence the manner in which self-interested decisions will be made, the dispositive factor concerning recognition of a communitarian right will ultimately be the individual interests of the decision maker.[31] In the final analysis, therefore, a communitarian right could never exist unless recognition of the right were in the interest of the individual charged with making the recognition decision. Accordingly, it is inaccurate to assert that a right is communitarian.

Because communities are able to act only through individual representatives, the inescapable problem with a theory of communitarian rights is that any effort to formulate, implement, ascertain, or even report a collective action is itself an individual action, dictated by individual interests rather than by any actual measure of the collective good. As the problem with liberal theory demonstrates, however, the nature of individuality is equally perverse. Individuals do not exist in isolation. Rather, they exist in societies that have power superior to their

31. Of course, arguments can be made that individuals are capable of acting in other than self-interested ways, but such arguments are as problematic in the context of communitarian rights as analogous arguments concerning the will of the majority are in the context of individual rights. *See supra* text accompanying notes 4-10. Again, although there are a variety of ways in which individual interest could be measured, a positivist measure would appear to be the most reliable. Such a measure would eliminate the need to consider what the individual said, or even perceived, was in her best interest by defining the decision maker's individual interest to coincide with the way in which the decision maker resolved the claim of right. *See supra* note 4.

own. As a result, individuals have only that degree of individuality that is recognized and permitted by the society. As an analytical matter, liberal theories of individual rights and communitarian theories of collective rights suffer the same flaw. Both depend on a meaningful distinction between the individual and society which does not exist. Individuals have only that autonomy that the society chooses to give them and the society has only that will accorded by its individual agents. Any theory of rights, therefore, that rests on a distinction between the individual and society—a distinction on which all theories of rights necessarily must rest—is destined to lack analytical coherence.

C. EXTRAPOLATION

The analytical dilemmas generated by efforts to evaluate each of the foregoing theories of rights do not reflect defects inherent in the theories themselves. Rather, the dilemmas are artifacts of the mode of analysis used to evaluate those theories. The mode of analysis used was customary rational analysis, characterized by the application of logical rules to valid initial premises—the same analytical method that we purport to use whenever we perform rational analysis. If the foregoing analyses had their intended effect, they should have been at least mildly unsettling. You should have been left with the feeling that I did something wrong, although you should be uncertain about precisely what my error was. The analyses are unsettling because the results they produce are counterintuitive. As for what I did wrong, however . . . well, I did absolutely nothing that the rules of the governing paradigm do not permit.

The most that can be said to refute the foregoing manipulations is that one does not have to set up the analyses as I have done; alternative definitions and perspectives could have been used which would have led to more satisfying results. But the point is that there is nothing analytically improper about setting things up as I did. The nature of language and logic is such that it is always possible to generate counterintuitive conclusions without violating any of the rules of rational analysis. By manipulating linguistic definitions and controlling the ways in which logical premises interact, it is possible to predetermine and consciously shape any conclusion that is produced. The only thing wrong with what I have done is that it leads to conclusions that are intuitively unacceptable. Our intuitions, however, cannot properly be relied on to help distinguish between

the manipulated conclusions and the arguably genuine ones, because the very reason that we have chosen the logical method for our rational analyses is that we do not trust our intuitions to lead us to valid conclusions. But as the foregoing manipulations suggest, the conclusions reached in accordance with the rules of a paradigm dominated by language and logic are not likely to be any more trustworthy.

II. LANGUAGE AND LOGIC

Rational discourse occurs in an analytical paradigm dominated by language and logic. For whatever reason, the legacy left us by ancient Greece and the Enlightenment was a fondness for rational thought and a distinct distrust of nonrational modes of analysis.[32] As a result, neither ineffable assertions nor illogical conclusions properly can be relied on to provide rational accounts of social phenomena. The problem with such a paradigm is that language and logic lack the capacity to account for the phenomena that they must explain. Language lacks the ability to encompass concepts that cannot be reduced to words, and logic refuses to recognize the full range of interactions that can occur among conceptual premises. It is not surprising, therefore, that a rational paradigm in which language and logic mark the limits of permissibility has failed to yield a coherent theory of rights. If better accounts of social phenomena are to be found, finding them will require a paradigm shift.

A. LANGUAGE

Current rational analysis consists of two stages. At the first stage, the social phenomena of concern are reduced to linguistic representations. At the second stage, those linguistic representations are incorporated into premises, which are then subjected to logical operations in the hope of generating reliable conclusions.[33] The logical evaluation that occurs at the second stage of the analytical process poses serious problems.[34] Even before reaching the second stage, however, the superfi-

32. It has been suggested that the ancient Greeks were not as smitten by rationality as is customarily assumed. *See* E. DODDS, THE GREEKS AND THE IRRATIONAL (1951).

33. For a similar characterization of the legal analytical process, albeit a characterization offered to support a somewhat different point, compare Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 591-92 (1981).

34. *See infra* notes 48-61 and accompanying text.

cially innocuous act of describing the pertinent social phenomena, which occurs at the first stage, is problematic. The difficulty stems from the nature and analytical use of language.[35]

Language has three limitations that make it susceptible to manipulation in a way that can undermine rational rigor. First, language is contingent and context-dependent rather than rooted in an objective reality which would give it the stability to withstand efforts at manipulation. Second, the rational paradigm places language under considerable pressure to be binary, which ironically causes linguistic formulations to be less rather than more reliable. Finally, language is incapable of directly capturing concepts that cannot be expressed in words, thereby permitting variations in linguistic approximations of those concepts to be interchanged without notice during the course of a particular analytical exercise.

Wittgenstein has established that language can be more satisfactorily conceived of as the context-dependent creation of a particular community than as a set of symbols that correspond to an objective reality.[36] For present purposes, this

35. There is a voluminous literature concerning the philosophy of language, on which the present discussion relies as indicated but in no way attempts to exhaust or summarize.

36. The hornbook reading of Wittgenstein is that after making unsatisfactory efforts in TRACTATUS LOGICO-PHILOSOPHICUS (1922) to account for the phenomenon of language by tying literal meaning to propositions that were accurate in a factual or scientific sense, Wittgenstein changed gears and attempted, in PHILOSOPHICAL INVESTIGATIONS (1935), to account for language as an open-ended outgrowth of community conventions about meaning. This is almost certainly an oversimplification. The fundamental problem with which Wittgenstein was concerned is related to whether language is completely attached to a pre-existing reality, not at all attached to such a reality, or something in-between. The problem is of course a difficult one, and Wittgenstein's views have themselves become the object of scholarly interpretation. *See, e.g.*, S. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982); *see also* Gellner, *The Gospel According to Ludwig* (Book Review), 53 AM. SCHOLAR 243 (1984) (reviewing S. KRIPKE, *supra*). An interesting view is that Wittgenstein's evolution from the *Tractatus* to *Philosophical Investigations* did not so much evidence a change in the nature of his views about language as it did a change in the nature of his views about how one should philosophize about language. *See* Pears, *The Mysteries of Meaning* (Book Review), NEW REPUBLIC, May 19, 1986, at 37 (reviewing A. AYER, WITTGENSTEIN (1985) and J. FINDLAY, WITTGENSTEIN: A CRITIQUE (1984)). Pears suggests that Wittgenstein ultimately transcended the question whether language was objective or subjective, *id.* at 39-41,—a suggestion that is consistent with the thesis of the present essay. More recently, Richard Rorty has explicitly urged that analytic philosophy transcend this and other similar questions. R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

means that language consists of terminology with variable rather than fixed content. The meaning of a term or linguistic formulation in a particular context is in part a function of both the speaker's intent and the listener's understanding.[37] As a result, language can become ambiguous; the message transmitted is not necessarily the same as the message received. Moreover, the interaction between intent and understanding that occurs as conversation progresses can give rise to additional possibilities for meaning that neither of the participants intended.[38] By adding a third listener or several listeners who then proceed to discuss the conversation among themselves, the potential for variations in meaning becomes vast. Indeed, the only reason that we are able to communicate with each other at all is that within a given community, homogeneity of perspective and experience limits the range of meanings likely to be given particular terms.[39]

Although the level of homogeneity in a given culture or subculture may be sufficient to permit ordinary conversation, it may not be sufficient to permit the degree of linguistic precision required to ensure rational rigor. Rational analysis, like the scientific method that it emulates, requires a high degree of precision in establishing the meaning of the terminology employed in a formal argument. In the context of legal, moral, or philosophical problems, however, the community is unlikely to display a high level of consensus concerning the meaning of the terms that must be used to define those problems. Terms such as "right" or "principle" or "antimajoritarian" are sufficiently imprecise that their definitions are almost certain to constitute the weak link in any rigorous analytical argument that employs them.[40] Moreover, the nature of the issues that are likely to be

37. Language is, however, not completely a function of subjective intents. Indeed, the nature of the external constraining factors is the essence of the problem with which Wittgenstein and others have been concerned. *See supra* note 36.

38. If the first speaker sends message A, but the second speaker receives message A' and responds by sending message B, which the first speaker receives as message B', the communication that actually occurs does not correspond to the communication that either speaker intended or thought had occurred.

39. Professor Tushnet has suggested a similar account of how legal decisions are made and how they secure acceptance in the face of doctrinal rules that are actually indeterminate. *See* M. Tushnet, *supra* note 22, at 1-9.

40. *Cf.* Lehman, *Rules In Law,* 72 GEO. L.J. 1571, 1579 (1984) (Law is an open system where rules do not fully specify particular actions or judgments; therefore, when law is treated as a closed, analytical system it will inevitably produce some wrong results.).

involved aggravates the problem. Social issues relating to abortion, race relations, or other matters touching on arguably fundamental rights invariably require elusive distinctions to be drawn and delicate balances to be struck. The imprecision inherent in the terminology that must be used to describe those issues, however, tends to make only gross accommodation among competing interests possible. The type of linguistic terminology required for a rational analytical approach to social problems is rooted in neither objective reality nor stable community consensus. Consequently, both intended and unintended exploitation of the resulting imprecision can weaken an analysis.

The second limitation on the capacity of language to facilitate rational analysis compounds the first. Although binary logic is an important component of the rational paradigm, it is useful only with respect to propositions that have either one polar value or another.[41] As a result, the desire to use logic creates an incentive to describe social phenomena in terms of linguistic dichotomies. In a linguistic dichotomy, however, the definition of an operative term can be made completely dependent on the definition of its opposite member. Good can be defined as the absence of evil; light can be defined as the absence of dark; and so forth. The terms in the dichotomy, therefore, become not only mutually supporting but self-referential as well.[42]

When performing logical operations on self-referential assertions, the inherent circularity of those assertions may often generate an analytical dilemma. Perhaps the most famous example is a variation of the Epimenides paradox, produced when one attempts to assess the truth of the assertion that all generalizations are false.[43] A similar dilemma occurred in the evaluation of the various formulations of rights theories considered in Part I of this Essay, which showed that antimajoritarian was the same as majoritarian, principle the same as politics, public the same as private, and the individual the same as society. Without violating the rules of logical analysis, the demonstration did make use of weaknesses inherent in the formulation of linguistic dichotomies to produce analytical dilemmas. For ex-

41. *See infra* text accompanying notes 49-53.

42. If good is the absence of evil, and evil is the absence of good, good can also be defined as the absence of the absence of good. *Cf.* Kennedy, *The Turn To Interpretation*, 58 S. CAL. L. REV. 251, 274-75 (1985) (emphasizing the fluidity, tensions, and manipulability of binary oppositions).

43. Bear in mind that the assertion is itself a generalization.

ample, the assertion that a right must be antimajoritarian becomes paradoxical when defining a right as something that, to have consequence, must be honored by the majority.[44] Because such weaknesses are inevitable, they will pose a potential problem whenever a dichotomy is used. Moreover, because we privilege binary, dichotomous language in conducting rational analyses, the language that we use will always create the potential for undermining the soundness of an analysis.

The third limitation on the capacity of language is the most obvious, but it is also the most significant. Language is incapable of directly expressing ineffable concepts. We can use language to hint at or talk around such concepts but never to capture them completely. Even the artistic uses of language that characterize our rhetoric, literature and poetry attempt to evoke, rather than directly express, concepts and ideas that elude articulation. The way that expository language attempts to deal with ineffable concepts is by describing or approximating them. Linguistic approximation, however, necessarily falls short of accurate representation.

Most of the concepts that are of legal, moral, or philosophical interest are ineffable.[45] The concept of rights provides a perfect example; it simply refuses to be confined by any linguistic formulation. As a result, the slippage that exists between a linguistic approximation and the actual concept that it purports to represent can pose additional problems in attempting a rational analysis of a social issue.[46] Because the linguistic formulation oversimplifies and potentially distorts the underlying concept, an otherwise valid analysis might be too artificial to be of much use. Even assuming that the analysis can work perfectly well on the level at which the linguistic representation occurs, it may simply fail to be relevant on the level at which the concept itself exists.

In addition, slight variations in the linguistic formulation of a concept might initially appear to be inconsequential because

---

44. *See supra* text accompanying note 6. The self-reference is accomplished by the subtle substitution of terms with slight variations in meaning, as discussed at *infra* text accompanying note 47.

45. For a discussion of the psychology of decision making that relies on ineffable understanding, see W. LEHMAN, HOW WE MAKE DECISIONS 69-95 (1986).

46. To simplify matters, I am assuming that there is such a thing as an "actual concept" of rights. Realistically, impressions about the concept may vary in the same way that the meaning of a linguistic term varies. The point of the present argument, however, is that for any given "actual meaning" of the concept, no linguistic formulation is capable of capturing that meaning.

they do not alter the accuracy with which the formulation approximates the underlying concept. Interchanging one linguistic approximation with another in the course of the same analysis, however, can undermine rigor and distort results in a way that might escape notice. Whether done intentionally or through inattention, the effect can be to undermine the reliability, as well as the intuitive acceptability, of an analysis. Indeed, the conclusions generated in Part I may well seem counterintuitive because of the slippage that exists between the linguistic formulations used and the ineffable concepts that they were offered to represent. For example, the self-referential antimajoritarian dilemma was created by substituting the formulation of a consequential right for the formulation of an antimajoritarian right midway through the analysis. Because no linguistic formulation fully captures the ineffable concept of rights, the slippage between each term and the underlying concept permitted the substitution to go largely unnoticed or, if noticed, to be largely unobjectionable.[47] Not only does language have limitations that can adversely affect efforts at rational analysis, but the difficulties introduced through heavy reliance on language are then exacerbated by analytical conventions that place heavy reliance on logic as well.

B. LOGIC

The allure of logic appears to lie in its promise for promoting harmony. The rules of logic provide that a conclusion is true if it logically follows from true premises. Accordingly, when the logical method establishes a conclusion as true in this irrefutable way, it cannot be the subject of legitimate debate. Because all rational people must accept the conclusion, the method leads to social harmony. This vision of harmony almost certainly accounts for our persistent reliance on logical analysis as the proper approach to social problems. This vision, however, has a flaw which is fatal to its acceptability. Logical analysis can ensure true conclusions only if it starts with true premises. The premises that we use to describe our social problems, however, are neither true nor false; they are indeterminate. Logic tells us nothing about how indeterminate premises should interact to generate reliable conclusions. In addition, logical analysis has a tenacious capacity for self-preservation that tends to make it affirmatively

47. *See supra* note 44.

counterproductive.[48]

1. Binary Reduction

Logical rules are designed to govern the interaction between premises, but the logical method says nothing about the validity of the premises themselves. To ensure that a logical conclusion is true, therefore, it is necessary to ensure that the initial premises are true.[49] Although demonstrating the metaphysical truth of a premise that describes a social phenomenon would be difficult, agreement with the premise can serve as an adequate substitute for truth.[50] As long as the analysis complies with the logical rules, any conclusion generated should be acceptable at least to those who agree with the initial premises. The nature of social phenomena is such, however, that it rarely makes sense to speak of truth and falsity, or even acceptability, of the premises used to reflect social principles. Too many qualifications and contextual factors affect the validity of a particular description of a social phenomenon to ascribe to it the required binary truth value. At most, the truth value of such a premise is indeterminate, but such a classification disqualifies the premise for any use that is consistent with logical rigor.

Realizing the importance of acceptable initial premises, so-

48. The present discussion concerns binary logic of the type commonly used in legal and philosophical discourse. Once again, there is a voluminous literature on logic, which the present discussion does not attempt to exhaust or summarize. It should be noted that there do exist nonbinary, multivalued logical systems capable of governing the interaction between premises whose truth values are unknown or are understood in terms of probabilities. Those logical systems, however, are unlikely to be of more use than binary logic in helping to resolve the types of social problems that are currently under consideration. In addition, there are more esoteric systems, with names like epistemic logic, quantum logic, fuzzy logic, and complimentarity, which are highly technical and beyond the scope of the present discussion.

49. *Cf.* R. NOZICK, PHILOSOPHICAL EXPLANATIONS 13-18 (1981) (suggesting a distinction between deductive proof, for which truth of premises is required, and philosophical explanation, for which such truth is not necessarily required).

Truth and falsity is not the only dichotomy that can be used in a logical analysis. Any dichotomy will suffice as long as it is exhaustive. Accordingly, dichotomies such as public/private or principle/politics can properly be used in a logical analysis as long as the relationship between the two members is recognized to be binary. It is always possible to restate such a dichotomy in terms of truth or falsity by focusing on only one member. For example, with respect to the public/private dichotomy, it is either true or false that something is public. Moreover, because the dichotomy is exhaustive, falsity with respect to one member constitutes truth with respect to the other.

50. *See id.* at 14.

cial theorists, including those who concern themselves with rights, select initial premises that appear to be true. Frequently, theorists select a premise that is linguistically too imprecise to generate much opposition, such as the premise that all people are entitled to the equal protection of the laws. Alternatively, it is possible to prescribe a procedure for the production of conclusions that will maximize their acceptability, such as Rawls's famed original-position procedure for deriving principles of justice.[51] Neither the imprecise nor the procedural premise, however, can be useful in a logical analysis because neither possesses a truth value that is susceptible to binary reduction.

A linguistically imprecise premise is indeterminate rather than true or false. The very imprecision that maximizes acceptability also deprives the premise of the capacity to yield particular results to the exclusion of other results. If the premise were precise enough to yield only one result, it would be too precise to secure general acceptability.[52] Whether the equal protection principle, for example, requires the assessment of an income tax against everyone in a fixed amount, at a fixed percentage, or in progressive percentages depends on what one means by "equal." If one decides that "equal" means identical numerical value, the equal protection premise arguably acquires a determinate meaning, but it will not be a generally accepted one. Many people will find the premise to be false in the income tax context, thereby making it unsuitable for incorporation into a logical analysis. Those people will reject any conclusion generated from the premise, and the desired social harmony will not ensue.

In the context of most social problems, the act of ascribing a truth value to a premise—deciding whether or not the premise is acceptable—replaces rather than facilitates logical analysis. Before accepting or rejecting a premise one would first want to know the purpose for which the premise was being offered. Although numerical equivalence might be a perfectly acceptable construction of the term "equal" in a mathematical context, that does not establish its acceptability in an income tax context. It would, therefore, be unwise to agree to an im-

51. J. RAWLS, *supra* note 2, at 118-92.

52. This observation has been made by others. *See, e.g.*, J. ELY, *supra* note 15, at 63-65 (quoting R. UNGER, KNOWLEDGE AND POLITICS 78 (1975) and Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 994 (1967)).

precise proposition before knowing how it was to be used. Peeking ahead to see how a premise will be used before taking a position on its acceptability, however, overrides the logical analysis. Conditioning the acceptability of the premise on the conclusion to which it is linked defeats the whole purpose of conducting a logical analysis. The conclusion has generated the premise rather than having followed from it. Stated differently, the very meaning of the premise has been intrinsically tied to the conclusion that it will be said to have generated. The system has been closed before the analysis even begins, thereby ensuring the desired result.[53]

Procedural premises are equally troublesome. Unlike a linguistically ambiguous premise, for which people supply meaning in a given context as a direct function of the purpose for which it is used, a procedural premise arguably has a meaning of its own that can exist independent of the conclusions to which it gives rise. Rawls advocated a procedure for establishing principles of justice through a hypothetical process of social contract negotiations. Rawls's negotiators would be individuals who, in the "original position," have equal rights in the choice of principles and wear a veil of ignorance that keeps them unaware of their own characteristics so they cannot merely advance their own interests.[54] The procedure is designed to serve as a premise that has enough appeal to be generally acceptable even in the absence of knowledge about what particular principles or conclusions it will generate. Such appeal is unwarranted, however. To the extent that the procedural premise seems acceptable, it is only because it too is sufficiently imprecise to permit all adherents to suppose that it will generate the principles that they like. If, for example, the premise were said to generate the conclusion that racial minorities should be exterminated to prevent mongrelization of the dominant race, it

53. The "peeking ahead" phenomenon is illustrated by the suggestion that a second-order-preference definition of rights could have been used to avoid the antimajoritarian dilemma. *See supra* note 11. One would not normally object to characterization of a right as antimajoritarian until, after peeking ahead, one saw the trouble that it would entail. Presumably, one would also be reluctant to agree to a second-order-preference characterization without first knowing how that characterization was ultimately to be used. *Cf.* Kelman, *supra* note 33, at 591-92 (suggesting that "interpretive construction" undermines "rational rhetoricism"). For a forceful assertion that all of our observations—even those of the hard sciences—are necessarily governed by the theoretical framework in which those observations are to be employed, see P. FEYERABEND, AGAINST METHOD 31 (1975).

54. J. RAWLS, *supra* note 2, at 118-92.

is unlikely that members of racial minorities would approve. The racial minority members would argue that the procedure they had in mind when they accepted the procedural premise does not generate such a principle, just as proponents of a progressive income tax would argue that the equal protection principle they had in mind does not require numerical equivalence in the income tax context.[55] In fact, Rawls—who creates the impression of logical rigor through frequent use of terms like "rational," "proof," "theorem," "premise," and "conclusion"[56]—encourages just this type of result-oriented, intuitive evaluation of principles to produce a desirable state of "reflective equilibrium."[57] The acceptability of a procedural premise, like that of the indeterminate premise, will have to be determined by a peek at the conclusion to which it is to be linked which, once again, overrides the logical analysis.[58]

---

55. More realistically, Rawls asserted that his procedural premise would result in the adoption of a maximin rule to govern the selection of particular principles of justice—a rule borrowed from decision theory—that would direct the social contract negotiators to select principles that would maximize the social condition of the minimally advantaged in society. J. RAWLS, *supra* note 2, at 152-53. Professor Kaye, however, has demonstrated that the maximin rule is too specific to be unobjectionable. Although it constitutes one rational strategy for selecting principles of justice in the original position, Kaye argues that there are several other decision-theory strategies that are just as rational under the conditions of uncertainty existing in the original position. Kaye, *Playing Games With Justice: Rawls and the Maximin Rule,* 6 SOC. THEORY & PRAC. 33, 37 (1980).

56. Others have also made this observation. *See* R. WOLFF, UNDERSTANDING RAWLS 3-5 (1977); Kaye, *supra* note 55, at 33.

57. Rawls himself recognizes the tension between deductive and intuitive decision making that is present in his argument. He states that he is striving for deductive truth but admits the significant influence of intuition. *See* J. RAWLS, *supra* note 2, at 121. His concept of reflective equilibrium is offered to mediate this tension through a dialectical process—Rawls calls it "Socratic," *id.* at 49—by which principles are tested against intuitions and intuitions are tested against principles, and each serves to refine the other. *Id.* at 20, 48-51, 432, 579. A central purpose of the present essay is to argue that, to date, we have not developed an epistemological model—a paradigm—in which such a form of argument is explicitly cognizable. It is, for example, easy to characterize Rawls's argument as entirely intuitive because it permits the rejection of a principle whenever the principle generates an intuitively distasteful result. Under this characterization, the concept of reflective equilibrium becomes nothing more than a sophisticated description of the process through which intuitions might work. If one is committed to the "principle" of the indeterminacy of principle, the urge to characterize Rawls's argument as entirely intuitive becomes irresistible.

58. Even when the truth value of premises can be established satisfactorily, logical systems still possess a curious characteristic that might well make one reluctant to submit to logic completely. Gödel has demonstrated that within closed, consistent logical systems having a threshold level of complexity

2. Counterproductivity

Not only is logic of little use in connection with premises having an indeterminate truth value, but our heavy analytical reliance on logic may be affirmatively counterproductive as well. Because the difficulties inherent in assessing the soundness of a logical conclusion are not generally recognized, we are likely to accord excessive deference to logical analysis. We tend to treat logical conclusions as if they were true in some neutral and detached sense rather than regarding them as contingent adjuncts to particular preferences that we happen to have under particular circumstances. When we fine people, put them in jail, or order them to pay damages for breach of contract or negligent driving, we do not tell them that we merely prefer for them to endure such fates. Rather, we tell them that general principles to which they themselves subscribe have sealed their fates because the particular consequences they must suffer follow logically from those principles. It is unlikely, however, that we could either give or receive such explanations if we better appreciated how tenuous they were. Accordingly, our deference to logic can be counterproductive to the extent that it perpetuates a distorted account of why we do the things that we do to each other.[59]

---

and sophistication, there exist formally undecidable statements—propositions whose truth or falsity can never be proven. *See* M. KLINE, MATHEMATICS: THE LOSS OF CERTAINTY 260-64 (1980); E. NAGEL & J. NEWMAN, GÖDEL'S PROOF 6, 98 (1958). Loosely analogized to the legal system, Gödel's theorem might mean something like the proposition that the legal status of certain claims could never be known. It might be possible, for example, to determine that the first amendment protected political speech and that it did not protect obscenity, but impossible to ever determine whether the first amendment protected commercial speech. The differences between formal logical systems and our less rigorous legal system are substantial enough that it is probably not useful to attempt a direct application of Gödel's theorem to legal or philosophical analyses. Metaphorically, however, Gödel's theorem does suggest a cause for uneasiness. The existence of undecidable statements within a logical system means that the system is incomplete. The whole point of selecting logic as the core of our notion of rationality, however, is that logic constitutes a closed system in which things happen in a predictable way, in accordance with orderly rules that are understandable and reliable. One of the implications of Gödel's theorem is that logic is not such a system. To account for everything that goes on—to determine the truth value of certain statements or to explain why they are undecidable—one would have to go outside of the system. The intrigue that Gödel's theorem holds for me lies in its implication that there has to be some more comprehensive way of understanding the phenomena with which we are confronted than the way that logic permits us to understand them.

59. Arguably, logic is useful as a tool for social control, irrespective of its coherence, because it causes individuals to submit to actions that they would resist if those actions were perceived to result merely from the particular pref-

Furthermore, reliance on the logical method may motivate us to engage in modes of thought that are inappropriate to the circumstances. Because we realize that logical analysis requires the use of binary premises, we tend to think in dichotomous terms, even in circumstances in which such thought is likely to be inappropriate. Most social phenomena are too complicated for binary reduction. Whether something is public or private, for example, depends on so many factors and perspectives that describing a social phenomenon in terms of the public/private dichotomy can become more than a descriptive act. The selective inclusion and exclusion of characteristics necessary to accomplish the binary reduction may actually alter the perceived nature of the phenomenon described. The end result of repeated exercises in binary reduction can be to convey an oversimplified version of the social world in which we live.[60]

Finally, our attachment to logic is counterproductive because it dilutes the incentive to formulate new modes of conceptualization that could help us transcend the flaws of logical analysis. Because what we think is largely a function of how we think, our attachment to logical analysis tends to perpetuate itself. To make logic useful, we conceive of the world in binary terms, and by restricting ourselves to a binary mode of thought, we continue to perceive logic as useful. Imposing such a restriction on our mode of thought poses the risk of making us complacent. To the extent that we succumb to the temptation to translate our world into the two dimensions required for logical analysis, we will have failed to imagine new, more satisfying forms of conceptualization that might permit us to overcome the limitations of logical thought.

---

erence of a social decision maker. But legitimation of this type is rarely offered as a justification for logical rigor, and such use of logic may not be socially desirable.

60. For example, when the Supreme Court, in INS v. Chadha, 462 U.S. 919 (1983), held unconstitutional the controversial legislative veto device through which Congress sought to retain control over administrative agencies, the majority's reasoning was so "binary" that one might well have been led to wonder how the case had managed to generate so much scholarly debate. The Court held that the veto device had to be either a law or not a law; and because it was a law, it was unconstitutional because it did not follow the constitutionally prescribed procedures for enactment of laws. *Id.* at 956-59. The binary characterization of the legislative veto masks serious conceptual difficulties, including difficulties that are arguably paradoxical. *See* Spann, *Deconstructing the Legislative Veto,* 68 MINN. L. REV. 473, 493-99, 516-27, 536-44 (1984) (analyzing the *Chadha* decision and the legislative veto); Spann, *Spinning the Legislative Veto,* 72 GEO. L.J. 813, 815-16 (1984) (alternatives to the legislative veto).

C. PARADIGM SHIFT

Full appreciation of social phenomena may require that we abandon our present rationality, characterized by language and logic, in favor of a new mode of thought. Thomas Kuhn described what has now become the classic concept of a paradigm shift.[61] A paradigm shift occurs when a scientific community decides that perceived phenomena can be better understood by changing the conventions governing the ways in which they are understood. By imposing a new model or organizing system—by changing the rules of the analytical game—a paradigm shift permits qualitatively distinct and more satisfying appreciation of the phenomena.[62] Richard Rorty has extended the concept of a paradigm shift from the scientific context in which Kuhn discussed it to the realm of philosophical discourse, in which a revolution in governing conventions can be as dramatic as it is in a scientific context.[63] Growing recognition of the limitations of language and logic suggests that the conditions needed to prompt a paradigm shift in rational discourse currently exist.[64]

People tend to believe that the analytical paradigm governing rational discourse is immune from the type of wholescale modification that characterizes a paradigm shift because they believe that rationality corresponds to reality in a way that makes rational analysis more than just another way of looking at things. That belief, however, is erroneous. Our logic-based system of rationality is neither natural nor compelled by any need to correspond to objective reality. It is simply a human invention. Like mathematics, economics, or Freudian psychology, rational accounts of phenomena constitute nothing more than an organizational overlay that we impose on our perceptions. True, absent close scrutiny, rational explanations seem to account accurately for much of what we

61. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. enlarged 1970).

62. *Id.* at 52-53.

63. *See* R. RORTY, *supra* note 36, at 322-56.

64. In addition to Rorty's dissatisfaction with the conventions of traditional analytic philosophy, *see id.*, the Critical Legal Studies movement has come to symbolize dissatisfaction with the conventions of traditional legal analysis. For a comprehensive characterization of this movement, see Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985). For examples of Critical Legal scholarship, see THE POLITICS OF LAW (D. Kairys ed. 1982); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984). A Critical Legal Studies bibliography is printed in Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

perceive, but that was preordained. Our perceptions and our systems for organizing them interact in much the same way that logical conclusions and premises interact. After peeking ahead, we ensure that the organizing system will be largely satisfactory by closing the system. Everything that happens will happen in accordance with the rules of the system because we refuse to recognize as valid any perceptions that do not comply with the rules. If we had another organizing system, it would work just as well as our rational organizing system does—it would have to. We would tailor our perceptions to work within that substitute system just as we now tailor our perceptions to operate within our rational paradigm.[65]

Alternatives to the paradigm that presently governs our rational discourse do exist. Various eastern philosophical and religious organizing systems, such as Zen Buddhism, are distinctly nonlogical in nature.[66] Indeed, such systems appear to deny the possibility of attaining ultimate understanding through rational inquiry. Instead, they stress contemplation of what we would consider logical paradoxes for the purpose of transcending the rational modes of conceptualization that make them paradoxical.[67] In our own culture, we rely heavily on nonlogical organizing systems in a variety of contexts. Quantum theory in modern physics is replete with observed phenomena that are logical impossibilities.[68] The Heisenberg uncertainty principle, for example, demonstrates that subatomic particles are often in two places at once—or no place at all—even though such an occurrence cannot be accounted for through the application of logical rules to the prequantum axioms of physics.[69] Perhaps the most prevalent form of nonrational conceptualization in our culture exists in the humanities. Through art, music, and literature we conceptualize and com-

65. For recognition and discussion of the difficulties entailed in arguing that one should yield or compromise a core belief, such as belief in the inherent objective nature of things, see W. QUINE, FROM A LOGICAL POINT OF VIEW 42-46 (1980).

66. *See generally* A. WATTS, THE WAY OF ZEN (1957) (a basic explanation of Zen philosophy).

67. *See id.*

68. *See* H. PAGELS, THE COSMIC CODE (1982) (containing a comprehensible discussion of quantum physics). *See also* H. PUTNAM, REALISM AND REASON 46-53 (1983) (describing the uncertain position of a molecular particle in quantum mechanics).

69. *See* H. PAGELS, *supra* note 68, at 87-91; *cf.* Lehman, *supra* note 40, at 1591-92 (discussing, inter alia, the logical problem inherent in attempts to categorize light).

municate in ways that have nothing whatsoever to do with logic or rationality, and the absence of rational rigor is vital to their effectiveness. Indeed, it would never even occur to us to place heavy reliance on rationality in such contexts.

We have had all the perceptions necessary to prompt a paradigm shift in rational analysis. Indeed, the increasing number of books and essays like this one suggests that the shift may have begun already.[70] At least one writer has argued that a paradigm shift cannot occur until a new paradigm has been envisioned to replace the old one.[71] Whether or not that is true, we already know enough about the essence of the new paradigm to begin imagining its contours. The new paradigm will be characterized primarily by features that compensate for the defects existing in the present paradigm.

III. THE NEW PARADIGM

A new paradigm, providing an alternative way of viewing old data, emerges when an existing paradigm ceases to permit satisfactory analysis. Poststructuralist, modernist schools of thought that have influenced theology and the humanities recently have begun to influence law and moral philosophy as well.[72] By questioning the distinction between reality and perceptions about reality, these schools of thought have increased the range of social phenomena that we are potentially able to envision. Because of limitations imposed by language and logic, however, the paradigm that currently governs our rational discourse has ceased to serve as a satisfactory medium for conceptualizing social phenomena; its descriptive and explanatory powers have not kept pace with the complexity of our percep-

70. Several recent works proceed from the assumption of acute indeterminacy in fashioning new approaches to our legal and philosophical problems. *See, e.g.*, L. CARTER, CONTEMPORARY CONSTITUTIONAL LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS (1985); W. LEHMAN, *supra* note 45; R. RORTY, *supra* note 36; Boyle, *supra* note 64; Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Heller, *supra* note 2; Kennedy, *supra* note 42; Lehman, *supra* note 40; Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); M. Tushnet, *supra* note 22; Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); *cf.* R. PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE (1974) (" 'What's emerging from the pattern of my own life is the belief that the crisis is being caused by the inadequacy of existing forms of thought to cope with the situation.' " *Id.* at 169.).

71. Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1217 (1985).

72. *See* sources cited *infra* note 75.

tions. A new paradigm, reflecting a more modern appreciation of rational thought, however, should help to overcome those limitations. Language can be reconceived so that it has the capacity to capture ineffable concepts. And binary logic can be de-emphasized so that our conception of rationality will tolerate a fuller range of interactions between ideas, including interactions that we presently consider to be logical impossibilities. Within such a reconceived analytical paradigm, it may be possible to formulate a coherent concept of rights. Ironically, however, because explaining the concept precisely may never be possible, the rights may always remain secret—comprehensible but not reducible to linguistic formulations.

A. MODERNISM

Modernism is a term that often refers to the belief that fundamental, structural assumptions are proper subjects for scrutiny and re-examination. In the context of Christian theology, modernism refers to a movement in the late nineteenth and early twentieth centuries that advocated re-examination of traditional religious doctrine in light of contemporary developments in science, history and philosophy. It connotes skepticism about religious authority, biblical doctrine and the historical accuracy of theological events.[73] In the humanities, modernism refers to a post-World War I movement, characterized by such works as nonrepresentational painting, atonal music and stream-of-consciousness literature, in which the conventions of traditional art forms ceased to be viewed as valid limitations on artistic expression.[74] Recently, theorists have suggested that modernist tenets also have begun to influence legal and moral philosophy.[75] Because modernism offers the promise of a qualitative advancement in analytical thought,

73. *See generally* A. VIDLER, THE MODERNIST MOVEMENT IN THE ROMAN CHURCH: ITS ORIGINS AND OUTCOME (1934) (description and origins of the modernist movement).

74. *See* Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1659-68 (1986) (discussing content and form of modernist art).

75. *See* Boyle, *supra* note 64, at 730 n.141; Luban, *supra* note 74, at 1687-93; Unger, *supra* note 70, at 587, 660-62. Similar influences are taking hold in analytic philosophy, *see* R. RORTY, *supra* note 36, in the philosophy of science, *see* P. FEYERABEND, *supra* note 53, and in social sciences such as social psychology, *see* Bruner & Feldman, *Under Construction* (Book Review), N.Y. REV. OF BOOKS, Mar. 27, 1986, at 46-49 (review of N. GOODMAN, OF MIND AND OTHER MATTERS (1984)), and psychoanalysis, *see* D. SPENCE, NARRATIVE TRUTH AND HISTORICAL TRUTH: MEANING AND INTERPRETATION IN PSYCHOANALYSIS (1982).

modernist concerns can form the structure of a reconceived analytical paradigm governing rational discourse.[75A]

Three tenets of modernist thought are relevant to the sorts of analytical dilemmas that can stymie rational thought within the confines of the present paradigm. The first is an insistent skepticism about the distinction between object and subject. The second, which builds on the first, is agnosticism concerning the distinction between reality and perceptions. The third, which builds on the second, is the liberation of imagination that results from the heightened importance of the role that perceptions are permitted to play. The cumulative effect of these three tenets may permit the formulation of more promising approaches to our analytical dilemmas.

A central tenet of modernist thought is its denial of a sharp division between object and subject. Modern art, which is often nonrepresentational, for example, not only invites but requires active viewer participation in the artistic communication. As a result, the "object" depicted in a painting is in part defined by the characteristics attributed to it by the "subject" viewing the painting, thereby undermining the distinction between the two.[76] In addition, critics have characterized the messages conveyed by modern art and by modern movements in other humanistic disciplines as being preeminently about the disciplines of which they are a part.[77] If by painting in a way that violates certain conventions, the artist is making artistic statements about those conventions and about painting itself, the distinction between object and subject once again begins to dissipate. The statements being made are about the statements being made.

In law and legal philosophy, a similar breakdown in the distinction between object and subject can be detected. For example, one of the reasons that it is difficult to escape the antimajoritarian dilemma is that it is difficult to distinguish the object of a theory of rights—the right itself—from the subject

75A. Much of modernism is firmly rooted in the early nineteenth century work of Hegel, which both expresses skepticism concerning the distinction between subjective mind and objective reality and advocates a dialectical method of logical thought permitting a synthesis between a thesis and its antithesis. For an explication of Hegel's work, see P. SINGER, HEGEL (1983).

76. *See* D. Luban, *supra* note 74, at 4-8.

77. *Id.* at 6 (citing S. CAVELL, MUST WE MEAN WHAT WE SAY 207, 219-20 (1968), M. FRIED, THREE AMERICAN PAINTERS: KENNETH NOLAND, JULES OLITSKI, FRANK STELLA (1965), and Greenberg, *Modernist Painting*, in THE NEW ART 67-68 (G. Battock rev. ed. 1973)).

of the theory—the majority that must honor the right for it to have consequential content.[78] The content of the right is so intrinsically tied to the manner in which the majority will recognize it that attempts to honor the distinction between the two may well be artificial. More generally, the essence of much modern critical thought is inescapably self-referential. Modern skepticism about the ability to give principled accounts of perceived phenomena necessarily must apply as well to the principles giving rise to that skepticism.[79]

The first tenet of modernism merges into the second. In those instances in which no clear distinction exists between object and subject, there also may be no clear distinction between objective reality and subjective perceptions about reality. If objects are largely a function of the viewer's perceptions about those objects, arguing about their true, objective nature may be much like arguing about whether a particular work of modern art is really a cloud or an amoeba. The question whether an objective reality exists at all is an interesting one, but it is one about which modernism can afford to be agnostic. In any important context, the role of perceptions is likely to be significant enough to be dispositive, whether or not one believes that those perceptions ultimately rest on an objective foundation. In the context of rights, perceptions would appear to be all that matter. Even the staunchest natural rights advocate would have to concede that the actual existence and content of a right is functionally irrelevant because it is unknowable. Both theoretical and practical discussions of rights completely depend on perceptions concerning those rights rather than on any actual content of the rights.

The third tenet of modernism follows directly from the second. By shifting the focus from objective reality to perceptions about reality, modernism increases the complexity of the problems that may confront us. Picasso's conception of a guitar, for example, is considerably more complex than a premodern conception. Similarly, the antimajoritarian dilemma, with its persistent refusal to honor the object/subject distinction, is more complex than the traditional conception of an antimajoritarian right. Modernism also increases the range of imaginable solutions to such problems. Active belief in an

78. *See supra* text accompanying notes 1-11; *cf.* Frug, *supra* note 70, at 1286-92 (extrapolating object/subject problems to the distinction between law and society).

79. *See, e.g.,* Boyle, *supra* note 64, at 713-15; Heller, *supra* note 2, at 163-72.

objective reality imposes constraints on creativity by recognizing external limitations on what is possible. Agnosticism concerning objective reality, however, accompanied by the view that operative reality can be modified through the alteration of perceptions about reality, serves to reduce constraint. It accords heightened importance to the role of perceptions which, in turn, increases the incentive to imagine novel escapes from seemingly insoluble dilemmas.

The essence of modernism lies in its willingness to question the most fundamental structural assumptions of a discipline in an effort to arrive at new levels of understanding. Modernism also encourages experimentation with novel perspectives even though they may generate theories with the capacity to undermine the very perspectives out of which they grow. The allure of such experimentation lies in its promise for transcending our current conventions about what constitutes impossibility. By relying on modernist insights to reformulate the conventions governing our analytical use of language and logic, we may be able to shift to a more promising rational paradigm.

B. LANGUAGE IN THE NEW PARADIGM

A modernist approach to analytical language would transcend traditional limitations on the form that language must take to be useful in an analytical endeavor. The type of language that we presently privilege when engaging in rational discourse is expository language, which is narrowly tailored for use in conjunction with logical analysis. Analytical language can be reconceived, however, in a way that privileges its literary rather than its expository use. In rational analysis, as in literature, language can be used to evoke reader responses directly rather than merely to describe objects and events. Moreover, once freed from its attachment to logical analysis, language can utilize complex rather than binary imagery to serve its function without undue artificiality or reductionism. Because freedom from such constraint permits literary language to be more expressive and articulate than expository language, literary language has a greater capacity to capture and convey ineffable concepts, despite their unwillingness to be reduced to words.[80]

80. A somewhat similar point has been made by Professor Weisberg, who argues that lawyers, mired in their penchant for language, have lost—indeed have come to symbolize loss of—the capacity for spontaneous human interaction. The preference of lawyers is to talk about justice rather than to dispense

Our present preference is to use expository language in connection with our analytical activities—a preference with a distinctly nonmodern flavor. Expository language presupposes the ability to construct linguistic approximations of actual concepts that are sufficiently precise to meet the demands of our analytical machinery. As a result, the objective when using language to engage in rational discourse is to define or approximate the pertinent concepts as precisely as possible. Indeed, we sometimes carry our penchant for precise expository definition to ridiculous extremes.[81] The underlying assumption appears to be that if we try hard enough, we can commit the essence of

---

it. Fittingly, Professor Weisberg makes his point by analyzing the role that law and lawyers have played in major works of fiction. *See* R. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION (1984). Although I am not prepared to concede the existence of natural justice, or any other natural state of affairs that can be approached or approximated through literary language, I am willing to postulate the existence of ideas, subject to varying degrees of societal sharing, that are qualitatively too complex to be expressed in expository terms without a significant loss in texture. It has been suggested that Weisberg's binary distinction between natural action and artificial rhetoric is itself artificially reductionist, as evidenced by the fact that the texts upon which Weisberg relies are themselves subject to interpretations that contradict his own. *See* Heinzelman & Levinson, *Words and Wordiness: Reflections On Richard Weisberg's* THE FAILURE OF THE WORD, 7 CARDOZO L. REV. 453 (1986). For Professor Weisberg's response, reasserting the preferability of certain textual interpretations over others, see Weisberg, *More Words On* THE FAILURE OF THE WORD: *A Response to Heinzelman and Levinson,* 7 CARDOZO L. REV. 473 (1986). In this regard, see also Weisberg, *How Judges Speak: Some Lessons On Adjudication in Billy Budd, Sailor, with an Application to Justice Rehnquist,* 57 N.Y.U. L. REV. 1 (1982).

Recognition of the advantages of viewing legal texts, such as statutes and judicial opinions, as literary rather than expository works constitutes a major strand of the law-and-literature movement, in both its moderate forms, *see, e.g.,* J. WHITE, THE LEGAL IMAGINATION (1973), and extreme forms, *see, e.g.,* Fish, *Working on the Chain Gang: Interpretation in Law and Literature,* 60 TEX. L. REV. 551 (1982); *see also* West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner,* 99 HARV. L. REV. 384 (1985) (discussing Posner's mischaracterization of human motivation, consent and wealth maximization); Posner, *The Ethical Significance of Free Choice: A Reply to Professor West,* 99 HARV. L. REV. 1431 (1986); West, *Submission, Choice and Ethics,* 99 HARV. L. REV. 1449 (1986); *see generally Symposium: Law as Literature,* 60 TEX. L. REV. 373 (1982) (textuality and the lawyer's enterprise).

Difficulties can be encountered in attempting to define literature, as opposed to exposition, especially if one insists upon an expository definition. *See* T. EAGLETON, LITERARY THEORY 1-16 (1983).

81. In American Textile Mfr. Inst., Inc. v. Donovan, 452 U.S. 490, 508-09 (1981), Justice Brennan pretended that a profoundly difficult social issue, the proper manner of regulating exposure to toxic substances when the effects of given exposure levels is uncertain, could be resolved by reliance on the dictionary definition of a statutory term. In the context of this issue, the statu-

a concept to paper by filtering out distracting nuances and connotations.[82] As discussed in Part II above, however, the logic on which we rely in conducting rational analysis often demands a higher degree of precision in describing social concepts and phenomena than is available through linguistic formulations.[83] Moreover, the failure to attain the requisite degree of precision can introduce distortions that undermine the soundness of an analysis.[84] To date, we have tended to view the literary use of language as inappropriate in conducting rational discourse and have affirmatively tried to avoid the types of studied ambiguity that characterize literary language.[85] Directly evoking the concepts pertinent to rational discourse through literary techniques, however, is perhaps better than depicting them inaccurately through expository approximations.[86]

Direct evocation rather than description of concepts is, of course, possible. That is what art is all about. And such artistic use of language is the essence of literature. Because literary devices can convey even elusive concepts with great precision, an analysis incorporating literary uses of language avoids much of the distortion introduced by an analysis incorporating expository language. A short story or novel, for example, is almost certain to better convey a concept such as love or hate or terror than is the most sophisticated expository description. No matter how good an approximation the expository formulation is able to offer, the literary work will necessarily be more satisfactory because the literary work is able to evoke the actual concept itself. Such direct evocation, in turn, minimizes distor-

---

tory term could not plausibly have had the meaning that the dictionary and the Court attributed to it.

82. Carol Gilligan, together with a strand of the feminist movement in law, has suggested that such a hard-nosed analytical approach is characteristically masculine. C. GILLIGAN, IN A DIFFERENT VOICE 70 (1982); Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process,* 1 BERK. WOM. L.J. 39 (1985). This maneuver raises intriguing questions about the sorts of strategies that are likely to best serve the long-term interests of gender-based equality.

83. *See supra* text accompanying note 40.

84. *See supra* text accompanying notes 45-47.

85. Perhaps the clearest illustration is the way that lawyers and philosophers always insist on defining and redefining their terms.

86. This strategy presupposes the existence of a prelinguistic realm, something that many might dispute—perhaps even Wittgenstein. *See supra* note 36. The size and shape of the prelinguistic realm may vary from individual to individual. Personal experience suggests that some people claim to think in words, while others claim that they must translate their thoughts into words when they wish to communicate those thoughts to others.

tions by maximizing correspondence between the concept and its representation in the analytical context.

The relative advantage of literary language can be particularly high in the context of contemporary analytical efforts. In logical terms, modern conceptualizations of the type that are relevant to legal, moral and philosophical problems can be sufficiently complex that they elude binary or dichotomous exposition. Moreover, the reductionism required to describe complex relationships as binary ones can be seriously distorting. Literary language, however, works through reliance on literary devices such as narrative, metaphor, imagery, juxtaposition and the like, rather than through expository descriptions.[87] These literary devices operate in a manner that is largely indifferent to the degree of logical complexity inherent in the concepts that they seek to convey. As a result, literary language is better able than expository language to capture complexity. Furthermore, in using literary language, translation of multidimensional concepts into binary ones is unnecessary. Literary language, therefore, is likely to be of more use than expository language in analyzing the types of social phenomena that are now being constructed to correspond to our current perceptions about social reality.[88]

Because literary language operates through the direct evocation of potentially complex concepts rather than through attempted exposition of those concepts, even ineffable concepts can be incorporated into an analysis. Expository language is simply of no use when confronted with a concept for which no descriptive word or phrase exists. Words and phrases in their own right are only marginally relevant to literary language, however. Although words and phrases are used to create literary situations from which to evoke concepts, literary communi-

87. *See* L. CARTER, *supra* note 70, at 135-60 (analyzing law and dramatic narrative); Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative,* 97 HARV. L. REV. 4, 4-10 (1983); *see generally* J. WHITE, *supra* note 80, at 861 (discussing use of narrative). For a particularly effective example of how an idea too complex to be captured in expository terms can nevertheless be conveyed through literary techniques, see Bell, *The Supreme Court, 1984 Term—Forward: The Civil Rights Chronicles,* 99 HARV. L. REV. 4 (1985) ("[R]esort to the unreal may lead us toward a realism needed to uncover, at last, the real content of the racial complexity we call civil rights.").

88. For an appealing example of how literary language can permit a more satisfying account of a complex concept—specifically, the concept of intention—than one would expect from expository language alone, see Frug, *Henry James, Lee Marvin and the Law,* N.Y. Times Book Rev., Feb. 16, 1986, 7, at 1, col. 1.

cation itself occurs on a prelinguistic level. As a result, the absence of descriptive words and phrases does not preclude literary evocation of a concept. Limitations on the literary skill of an author may well preclude successful evocation of a complex or ineffable concept, but limitations in language itself are unlikely to be relevant.

If the science fiction writers are correct, we will eventually transcend any need for language at all, relying instead on the direct telepathic communication of pure ideas.[89] Although literary communication is but a small step in that direction, it is nevertheless a qualitative advance over expository communication. The present paradigm excludes literary communication from the sphere of rational discourse, but that exclusion cannot continue if we are to account satisfactorily even for the phenomena that we are presently able to perceive. It must certainly be transcended if we are to retain any hope of ever accounting for the more complex and elusive phenomena that we will likely be able to perceive in the future.

C. LOGIC IN THE NEW PARADIGM

A modernist approach to logic would significantly alter the nature of both premises and conclusions that we consider analytically acceptable. Logic is the system of rules that we use to govern the ways in which premises are permitted to interact to generate acceptable conclusions. Binary logic plays such a powerful role in the analytical paradigm presently governing rational discourse that the terms logic and rationality have become virtually synonymous.[90] Like language, however, the system of logical rules can be reconceived to facilitate more satisfying analyses of contemporary social and philosophical issues.

To provide useful guidance for analyzing the types of social phenomena that we are presently able to perceive, a reconceived system of logic will have to possess two features that make it fundamentally different from the present system. First, logic will have to recognize some role for the intuitive understandings that it now insists on excluding from rational analysis. Second, logic will have to recognize an expanded range of interactions as legitimate, including interactions that

89. *See, e.g.*, I. ASIMOV, SECOND FOUNDATION ch. 1, *First Interlude* in I. ASIMOV, THE FOUNDATION TRILOGY (1953).

90. The term "logical" is a synonym for the term "rational." *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1960).

are now considered logical impossibilities. Ultimately, a reconceived concept of logic may not only permit more satisfying analysis, but it may also permit an escape from the self-perpetuating logical cycle, thereby enabling us to get on with the business of conceptual and analytical maturation.

In the present paradigm, logical rigor is the safeguard against improper analytical deference to intuitions. The way we know that the judge is deciding the case according to the rules rather than according to personal biases and predispositions is that the process of logical deduction from general rules to specific case outcomes eliminates, or at least significantly reduces, opportunities for such intuitive factors to infect the analysis. Yet, we also know that this is not really the case. The logical manipulations undertaken in Part I illustrate that heavy reliance on intuition is necessary to distinguish between legitimate and illegitimate exercises of the logical method. Not only does rationality fail to actually exclude intuitions, but it cannot function without them.[91] Nevertheless, because our system of logic provides no formal role for intuitions, we presently have no viable model of the way in which we make our rational decisions.

A reconceived system of logic is likely to give explicit recognition to the necessary interaction between the present logical rules and the presently excluded intuitions.[92] Although the precise model of how the two will interact is presently unclear, as long as we continue to think in terms of the logic/intuition dichotomy, some provision for interaction almost certainly will have to be developed. Ultimately, we may view intuitions as controlling and will honor the present logical rules only to the extent that they have intuitive appeal. Alternatively, we may assign logic and intuition different conceptual jurisdictions, with traditional logic governing one area of rationality and intuitions governing another. Another possibility is that we will ultimately come to view logic and intuitions as interacting in some novel way, which we are as yet unable to conceive, that successfully dissipates the tension between the two. Clearly, however, a rational paradigm that tries to exclude intuition altogether is now obsolete.[93]

---

91. *See, e.g.*, J. RAWLS, *supra* note 2, at 121.

92. Arguably, this is what Rawls seeks to accomplish with his concept of "reflective equilibrium." *But see supra* note 57.

93. The logic/intuition dichotomy is simply a special case of the object/subject dichotomy. *See supra* text accompanying note 76. A satisfactory resolution of the problems relating to how logic interacts with intuitions may

The second feature that seems essential to a reconceived system of logic is the ability to account for a broader range of interactions between conceptual ideas than is possible under the rules of the present system. Whatever the full range of possible interactions ultimately proves to be, we are already aware of one type of interaction that traditional logic cannot tolerate. Because of its binary nature, logic cannot tolerate interactions that involve anything other than binary truth values. We now recognize that binary reductionism entails too great a loss of descriptive accuracy to continue as a limitation on permissible modes of rational analysis.[94] A reconceived system of logic will therefore, at the very least, require the capacity to deal with acute indeterminacy and simultaneous contradiction.[95]

The logical dilemmas generated in Part I suggest that it is possible to uncover internal contradictions and logical inconsistencies in almost any formulation of a binary premise. Virtually any dichotomy can be made to break down if scrutinized closely enough. This is true whether the dichotomy involves something as mundane as the right/privilege distinction or something as fundamental as the distinction between the individual and society. In the present paradigm, our response to this phenomenon has been to deny its seriousness because denial is necessary to salvage the system's utility. Consistent with modernist thought, however, a new paradigm would permit us to reconceive the governing rules so that we would not have to deny our perceptions of indeterminacy and simultaneous contradiction.[96]

A paradigm governed by rules of logic renders nonlogical thought impermissible for analytical purposes. But to evolve beyond a paradigm in which rational discourse is confined to logical thought, it is necessary to make analytical use of nonlogical modes of thought. As a logical matter, therefore, one can never escape an analytical paradigm that is governed by logic because one can never engage in the mode of analytical thought that is required to effect the escape. Indeed, the valid-

---

well transcend the distinction between the two. *See infra* notes 100-05 and accompanying text.

94. *See supra* text accompanying notes 48-60.

95. For example, it will have to allow something to be both public and private at the same time.

96. *See generally* commentators cited *supra* note 75. For a suggestion that aesthetic rather than deductive criteria should be used to evaluate the acceptability of arguments, see L. CARTER, *supra* note 70, at 105, 110, 166-86.

ity of this syllogism finds empirical support in the fact that we have as yet been unable to surmount our domination by logic, despite its obvious analytical inadequacies. We can never, therefore, break out of the self-perpetuating cycle of logically dominated rationality and move on to whatever more mature forms of analysis may await us, without first accomplishing something that is a logical impossibility.

Two things seem to follow from all this. The first is that when we ultimately do effect our escape to a post-binary logical paradigm, we cannot expect the route to be paved with traditional logical appeal. The second is that even though escape may be a logical impossibility, once we have managed to effect it, the impossibility will not much matter any more.

D. SECRET RIGHTS

A theory of rights in a reconceived analytical paradigm could evolve free from the constraints imposed by language and logic as we currently understand those concepts. Although literary language could be used to evoke a prelinguistic concept of rights, the rights themselves could never be accurately described in expository terms. In that sense they would be secret; no one would be able to say what they were. Like many secrets, however, everyone would know all about them. Indeed, the prelinguistic nature of rights might well mean that the degree to which their nature and scope could be comprehended would vary inversely with the degree to which they were subjected to expository description. In addition, because logic would no longer impose its binary restrictions, the coherence of the concept of rights would no longer have to rest on the troublesome distinction that we currently draw between the individual and society. The dichotomy could be transcended, and the mutually exclusive interests of both the individual and society could be simultaneously advanced. Moreover, the theory of rights that accomplished that feat would be untroubled by the logical impossibility of it all. Crucial to the evolution of a new-paradigm theory of rights, however, would be its ability to withstand the inevitable initial pressure under which it would be placed to regress to the present paradigm.

1. Literary Evocation

We have internalized a concept of rights despite the inability of any available theory to describe the concept adequately.

Whatever it is that we believe, we are unable to put it into words. Although we can have strong feelings about the existence of a particular right in a particular factual setting, the moment we offer a linguistic principle to justify recognition of that right, a counterexample can be imagined that is sufficient to demonstrate the inability of the offered principle to account for our intuitive recognition. As should by now be apparent, that process can be repeated for any principle offered to justify the recognition of any right. The failure of linguistic attempts at description, however, does not mean that a perceived right fails to exist. Rather, the right's intuitive tenacity indicates that its existence simply occurs on a prelinguistic level.

In a reconceived analytical paradigm of the type suggested herein, a theory of rights would not have to be reduced to a linguistic formulation. The rules of decision emanating from the theory would exist on a prelinguistic level and they would be invoked and applied on that level as well. This would not only avoid the distractions and distortions inherent in efforts to reduce operative rules to linguistic rules but, to the extent that settled understandings exist, they could be applied in their purest form, free from analytical manipulation.

Consider, for example, the plight of Robin Hood.[97] He stole from the rich and gave to the poor, while saving his country from tyrannical rule in the process. As a literary matter, Robin certainly had a right to perform such good works without being sent to the gallows for his efforts. If the concept of rights means anything, it has to encompass the activities of Robin Hood. Moreover, the Sheriff of Nottingham, although vested with legal authority, had no right to impose overburdening taxes on the peasants to fatten his own purse. And Prince John had no right whatsoever to seize the throne of England. By right, the throne of England belonged to Richard the Lion-Hearted. All of these assertions are indisputably correct. Ask any ten-year-old. Indeed, their correctness is clear even though not a hint has been offered as to what the concept of rights might entail. Insisting on additional exposition, however, may complicate matters.

As an expository matter, the minute we try to articulate the nature and scope of Robin Hood's rights, Robin could be in a bit of trouble. In some circumstances, income redistribution might be desirable, as might the prevention of improper usur-

97. For a discussion of the Robin Hood legend, see M. KEEN, THE OUTLAWS OF MEDIEVAL LEGEND 95, 174 (1977).

pations of governmental authority. In pursuing those objectives, however, Robin Hood mistakenly undermined social stability and respect for law by failing to utilize the proper channels for redress of his grievances. Moreover, even if one were to concede that Robin Hood had proceeded in a morally appropriate fashion, moral rights do not necessarily correspond to legal rights. When the state's authority to conduct a civil execution is at issue, the operative concept of rights must plainly be a matter of legal concern.

In our present analytical paradigm, with luck and a good lawyer, Robin may be able to beat the rap. His fate will depend upon which expository version of his rights is ultimately selected as controlling. In a paradigm governed by a reconceived set of analytical conventions, however, my guess is that we would just tell the jury the story and allow Robin's claim of right to resonate on the same intuitive level at which the operative rule of decision resides—a level at which the linguistic charges and specifications of the indictment would prove less distracting. To be sure, Robin's fate would still depend on which story the jury was told; disagreement about the facts is always possible. For any given set of facts, however, the operative rule of decision can be applied more precisely by not trying to explain what it is.[98]

The present claim is not that difficulties in interpretation will disappear if we stop trying to enumerate the characteristics and limits of rights. Difficult cases will continue to exist, and the extent to which even prelinguistic concepts are societally shared will continue to be a problem.[99] The present claim is, rather, that any difficulties in interpretation that do exist are likely to be exacerbated instead of ameliorated by expository reduction and linguistic analysis. The foregoing reference to ten-year-olds was intended to suggest that we have a great deal

98. The power of narrative in transmitting and evoking shared values has not gone unnoticed by legal commentators. *See, e.g.*, Cover, *supra* note 87, at 25-35 (discussing the creation of constitutional meaning); *see also* L. CARTER, *supra* note 70, at 150-60 (using the example of dramatics). Heavy reliance on narrative alone, in an effort to avoid distortions resulting from attempts at organizing perceived events, has also been advocated in other disciplines, such as anthropology and history. *See* C. GEERTZ, *Deep Play: Notes on the Balinese Cock-Fight*, in THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 412 (1973) (anthropology); Lehman, *supra* note 40, at 1590-91 (history), and authorities cited therein.

99. *See* M. Tushnet, *supra* note 22, at 1-9 (suggesting that the acceptability of legal decisions is a function of the degree to which the decision maker's values are shared).

of prelinguistic knowledge about rights. As ten-year-olds grow up and learn to do analysis, however, the problems become more difficult and the outcomes often change. The present claim is that many of those changes and differences are nonessential, and that little evidence exists to suggest that they constitute improvements. In a reconceived analytical paradigm, unliquidated rules of decision may well be permitted to operate in a manner that allows us to honor our rights without ever having to say what they are.

2. Logical Impossibility

In addition to the problems posed by linguistic reduction, a major reason that no satisfactory theory of rights has been able to emerge in the present paradigm is that such a theory would have to perform a task that is logically impossible. As already discussed,[100] individual rights can be secured only through social control, which necessarily entails the denial of individual rights. A theory of rights cannot, therefore, serve its purpose without simultaneously defeating its purpose. Because of their mutually exclusive, reciprocal nature, the simultaneous advancement of both individual and collective interests is a logical impossibility. Yet, simultaneous advancement appears necessary. No accommodation between the competing interests offered to date has been satisfactory, and there is little reason to believe that a better accommodation will be offered in the future. Even a theory that manages to strike an acceptable balance in one particular case can do so only by resting on some principle that may generate an unacceptable result in another. By de-emphasizing the role of binary logic, however, a reconceived theory of rights will be capable of simultaneously advancing competing interests, despite the logical impossibility of doing so.[101]

The way to accomplish logical impossibility is to modify our perceptions about it. If, as modernist schools of thought suggest, reality corresponds to perceptions about reality, we not only are able to modify our perceptions, but a modified set of perceptions will be every bit as effective as a change in what is traditionally viewed as objective reality. One way to perceive the problem of logical impossibility away is to alter our percep-

100. *See supra* text accompanying notes 16-20.

101. Feyerabend goes so far as to advocate epistemological anarchism precisely so that creativity and progress will not be stultified by prevailing analytical habits and conventions. *See* P. FEYERABEND, *supra* note 53, at 17-28.

tions concerning the problem. For something to be a problem, we must perceive it to be a problem. We rarely worry about the problem of discrimination based on hair color because we do not perceive it to be a problem. Likewise, we rarely worry about, or even take the time to understand, the devastating effects that Heisenberg uncertainty[102] has on the concept of logical impossibility; we have simply marginalized the importance of the problem. If we no longer thought of the social world as one permeated with inevitable conflicts between individual and group interests, the conflicts would no longer exist, and there would no longer be any need to seek an accommodation between the competing interests.

For example, part of the appeal of communitarian theories of rights is that they arguably permit the conflict between individual and collective interests to be transcended simply by terminating recognition of the conflict. Once individuals cease to be perceived as individuals and are perceived instead as indivisible aspects of the community that they comprise, there may no longer be any basis for conflict.[103] To the extent that such a modification of perceptions itself seems impossible, its viability is easy to demonstrate. Individuals are made up of a collection of isolated organs, cells, molecules, atoms and subatomic particles. With respect to the component parts of an individual, a liberal theory of rights is actually communitarian; it focuses on the totality of the component parts rather than on the components themselves in selecting the level of generality at which interest maximization should occur. The shift from a liberal to a communitarian theory of rights is simply a change in perceptions about the appropriate level of generality.[104] It is what Nathan Hale did when he regretted having only one life to give for his country. It should be no less understandable in the present context than it is whenever an unselfish hero puts the collective interests of the group ahead of his own interests.

Another way of dealing with logical impossibility is to shift frames of reference. Animation, for example, makes it relatively easy for an object to accomplish the logically impossible act of being in two places at once. By drawing the object first

102. *See supra* note 69 and accompanying text.

103. There are, of course, problems with this argument. *See supra* text accompanying note 28.

104. In this regard, see R. NOZICK, *supra* note 49, at 27-114, discussing the concept of self in a way that makes the foregoing illustration seem less artificial than it initially might appear to be. *See also id.* at 94-104 (discussing unities and wholes).

in one place and then in another on alternate frames of an animated film, logical impossibility can again be transcended. If one looks at the individual frames of the film, the object never appears in two places at once. If one shifts the frame of reference by looking at the screen when the film is shown, however, the object always appears in two places at once.[105]

In the context of rights, simultaneous maximization of competing individual and societal interests may also become possible by shifting frames of reference. With a separation of legislative and judicial power, for example, laws or constitutional provisions can be seen as maximizing collective interests because they can emerge only from a collective process. A judicial decision, on the other hand, can be seen as maximizing individual interests, because it can only emerge from the preferences of an individual decision maker. Other characterizations of the legislative and judicial processes are possible, but if we adopt a frame of reference in which those are the operative characterizations, we can, as through animation, transcend logical impossibility. A judge deciding a case is no longer seeking to ascertain legislative accommodation of competing individual and collective interests. Rather, the judge is, by definition, maximizing individual interests while construing an enactment that by definition maximizes collective interests. Although mutually exclusive, both individual interests in personal autonomy and collective interests in social control are simultaneously maximized whenever a judicial decision is rendered.

Shifting frames of reference and modifying perceptions about competing interests are means of managing the problem of logical impossibility. Even better means exist though—means that we have not yet imagined. Indeed, the very fact that we were able to imagine the two techniques discussed suggests that they are not exactly what we are seeking. Those techniques evolved from the present paradigm. After a paradigm shift, better techniques will be available, but by hypothesis, we cannot yet appreciate them because we have not yet shifted to the perspective in which they function. One thing is likely, however. When we do manage to formulate an acceptable theory of rights in accordance with a reconceived set of analytical conventions, avoiding the dilemmas embodied in our

105. This illustration was first offered in Spann, *Hyperspace* (Book Review), 84 U. MICH. L. REV. 628, 645 (1986) (review of J. AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY (1984)).

current concept of rights will seem so obvious that it will be difficult to understand how we could have missed it for so long.

3. Regression

A theory of rights that is reconceived to satisfy a new set of analytical conventions will necessarily be counterintuitive when it is first formulated. As a result, considerable pressure will arise to reject the theory as it is being developed, just as pressure will exist to reject the new set of conventions itself. Moreover, because the theory and the conventions will not only be different, but will also embody a novel perspective, the resistance will be that much greater.[106] If the new theory, and the new paradigm out of which it emerges, are ever to take hold, however, the resistance will have be resisted.

The most disturbing aspect of a new analytical paradigm, especially one responsive to modernist concerns, likely will be its insistence on the need to tolerate what we presently perceive to be logical contradiction. Even those sympathetic to the idea of a paradigm shift are likely to seek a palliative of one sort or another. Tolerance of logical contradiction, however, is almost certain to be a central tenet of a reconceived paradigm. Accordingly, efforts to deal with logical impossibility by suppressing its significance are likely to do more harm than good. Such efforts may operate as a regressive force, tying us to the safety of the present paradigm.[107]

To the extent that the critical literature currently being produced by legal scholars and moral philosophers marks the beginning of the hypothesized paradigm shift, much of it also illustrates the danger of regression. Although it successfully documents the inadequacies of the present paradigm, much of this literature chooses not to transcend it. My suspicion is that the only way to effect the transition to a new paradigm is to overcome the pull of the old one. Accordingly, the most promising way to respond to perceptions of doctrinal incoherence entails more than the generation of a new set of doctrinal rules or

106. In this regard, some of the reactions to relatively tame versions of critical legal studies have been unmistakably hostile. *See, e.g.*, Carrington, *Of Law and the River*, 34 J. LEGAL ED. 222, 227 (1984) (Dean Carrington's reaction to the scholarship of Professor Unger); *see also* Martin, *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL ED. 1-26 (1985) (responses to Carrington's reaction).

107. Embarrassingly, the two techniques offered above for transcending the limitations of logical impossibility, *see supra* text accompanying notes 102-05, probably fall into this category.

policy perspectives. Simply exposing reified visions of equality-based democracy by replacing them with reified visions of racism, sexism, or political tilt cannot be enough. Nor can replacing them with visions of nihilistic liberation or existential despair be enough. As helpful as alternative perspectives might be in our ordinary efforts to comprehend our social world, they are almost certain to weigh us down in our efforts to attain a qualitatively more satisfying understanding. In dissipating the tensions generated by contemporary critical perceptions, those alternative perspectives also dissipate the pressure to shift to a new paradigm in which even mutually exclusive perspectives can coexist.

CONCLUSION

The concept of rights is not coherent. It rests on a distinction between the individual and society that is ultimately untenable. An individual right can never be asserted successfully against the group because the group will acquiesce in recognition of the right only when the group's interest is to do so, thereby depriving the right of its individual character. Similarly, a communitarian right can never successfully avoid domination by individual interests because the community can act only through individual agents, who will acquiesce in recognition of a communitarian right only when it is in their individual interests to do so. As counterintuitive as the foregoing may seem, it is a completely rational way of viewing our social world, and it is a way in which the concept of rights is too problematic to play any comprehensible role. Although there are other ways of viewing the world—utilitarian and deontological ways—that are equally rational, the analytical paradigm that governs our current conception of rational thought offers no way of choosing among the competing world views to determine which is the most satisfactory.

The present paradigm depends heavily on language and logic as the staples of rational analysis. Language, however, is not sufficiently expressive to convey the ineffable concepts found in our social world, and logic is too limited to permit the range of interactions between those concepts that are necessary to account for contemporary social phenomena. Accordingly, a reconceived analytical paradigm must be developed so that we can better understand the phenomena that we are presently able to perceive. A new paradigm, structured around the central tenets of modernist thought, offers some promise for over-

coming our present analytical difficulties. In such a paradigm, language is likely to be more literary than expository, so that it will be able to evoke directly the ineffable concepts that the expository language of the present paradigm cannot satisfactorily describe. Logic in the new paradigm is likely to be reconceived to be more tolerant of presently prohibited interactions among conceptual premises, including interactions that we now consider to be logical impossibilities. Moreover, in the new paradigm, formulating a theory of rights that transcends the analytical dilemmas of the concept of rights in the present paradigm may be possible—although it may not be possible to say what the theory is.

I suspect that the biggest difference between the present paradigm and the paradigm into which it is evolving, however, will be in the new paradigm's liberation of imagination. Our tradition of rational thought is characterized most strongly by its reflex rejection of anything that is presently inconceivable, but a paradigm shift may leave us more open-minded. Modernist tendencies to prescribe a heightened analytical role for perceptions may constitute a move toward the new paradigm. A paradigm shift will undoubtedly enable us to develop many new perceptions that we cannot now anticipate. We may even be able to perceive away the tension inherent in using a logically structured linguistic argument to advocate the reconceptualization of language and logic. The new perceptions, however, will not themselves be the essence of the new paradigm. The qualitative advance that the new paradigm is likely to offer over the old will consist of its novel ability to permit the analytical use of ideas that have not yet been imagined. In a sort of conceptual hyperspace, we will be able to incorporate into our analytical framework ideas that we will not yet have been able to perceive even though we will not yet have perceived them. Then, our analytical maturation will be able to proceed forward in quantum leaps.